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FLATS AND ALLUVION.

At the last law term of the Supreme Court of Massachusetts, in the course of the arguments in a case involving the title to flats, and in which the case of *Deerfield* v. *Arms*, 17 Pick. 48, was cited, and commented upon by both sides, his Honor, the Chief Justice, in speaking of the rule established in that case, took occasion to mention the work of the civil law from which it was taken, (Denisart's Collection of New Decisions,) as containing an interesting article under the title "Attérissement," upon the rights of riparian owners to land formed by alluvion.

His Honor, in speaking of the work, suggested that a translation of the chapter cited, might be of some interest if published in some one of the legal publications of the day. The work is not contained in the Suffolk Law Library, but happening to meet with it elsewhere, we comply with his Honor's suggestion, and present our readers with as tolerable a translation of the article as short notice will allow.

The work was published in Paris, in 1683, in twelve volumes, and is in the form of a dictionary or abridgment.

It is entitled "*Collection de Decisions Nouvelles et de Notions* (1) *relatives a la Jurisprudence.*"

(1) As we do not give a translation of the title, it may be well to premise that this word has a different signification in French, and that nothing peculiarly Bostonian need be anticipated.

"ATTERISSEMENT.

Summary.

§ I. Definition. Signification of the word 'attérissement' in the Land Laws (*loix domaniales*).

§ II. Effect of the transportation of a piece of land from one place to another by the impetuosity of the waters.

§ III. Decree, which decided that a copyholder or feudatory (*censitaire*) can prescribe for the property in an attérissement against his lord in the custom of the Bourbonnois.

§ IV. Of the division of 'attérissements' among the different riparian owners (*proprietaires riverains*), who have a right to it.

§ I. The name 'attérissement' is given to lands which the waters of the sea or of rivers, form on their shores or in the middle of their bed, successively and insensibly, or, on the other hand, which they transport thither of a sudden.

We see by this definition that we must distinguish two sorts of attérissements; the one formed insensibly and successively by the effect of alluvion; the other formed of a sudden by the impetuosity of the waters, which transport sometimes pieces of land from one place to another.

2. Many laws cited in the *Dictionnaire des Domaines*, under the word Isles, give to the king the property in isles and islets, increase and attérissements formed on navigable rivers, and on the shores and banks of the sea. The terms of these laws apply only to attérissements formed in the midst of the waters, and not to such as are formed next to estates bounding on the sea, or on navigable rivers. As to this latter sort of attérissement, there is no doubt that they belong, by the right of increase, to the riparian proprietors, or to the lords in the cases mentioned under the word Alluvion, and hereafter. (§ 2.) This truth is acknowledged by Bacquet on the Rights of Justice, chap. 30, No. 8, page 406, and by the author of the *Dictionnaire des Domaines*, under the words Alluvion and Isles.

§ II. The piece of land which has been carried away by the impetuosity of the waters, and transported from one place to another, does not thereby change its master. He to whom it belonged can re-assert his property in it wherever he finds it. *Quod si vis fluminis de tuo predio partem aliquam detraxerit et vicini predio attulerit, palam, est eam tuam permanere. Instit. de rer. divis.*

There should not be an exception to this rule, even if the piece of land should stop in the midst of a navigable river

or near the sea shore. This would be to give an evidently unfair privilege to the domain of the prince. See Isles.

2. Nevertheless, when the owner of the land carried from one place to another, has neglected to make his claim for a time long enough for his land to become united and incorporated into the land of another, so that its limits can no longer be discerned, his right of reclaiming (*l'action en revendication*) ceases, and the land is acquired by him to whose substratum (*au fonds duquel*) the incorporation has taken place. The text just cited adds, after the words quoted above: *Plane si longiore tempore fundo vicini tui haeserit arboresque quas secum traxerit in eum fundum radices egerint ex eo tempore videntur vicini fundoe acquisitae esse.*

Dumoulin remarks on this text that it will suffice that there shall have elapsed without a reclaiming, a time long enough for the lands to have become united, and that a longer time, viz., that necessary for prescription, is not required. On this point he relies on the law, 9, § 2, ff de Damn. infect. See Dumoulin on the Custom of Paris, art. 1, glos. 5, No. 118.

3. In order to gain land in this manner, it must naturally, and by the sole effect of lapse of time, that the two estates become united; it would be otherwise if their union were the consequence of cultivation, and, in general, if it resulted from the act of man. See Incorporation.

§ III. The possessor of an attérissement may rightfully claim by prescription against the lord high justice (*seigneur haut justicier*) who has permitted him to take possession of the land thus formed. This question came up recently in the custom of the Bourbonnois, in this manner:

The miners le Moine found themselves in possession of a hundred sesterées (1) of land lying along the Alier, instead of thirty-six sesterées which their grants of title (*titres de concession*) gave them.

The Sieur Cazaubon contended that in his quality of lord high justice, he ought to have, according to the terms of the custom of the Bourbonnois, art. 340 and 341, the sixty-four sesterées coming from the attérissement. He opposed to the miners le Moine their primitive titles, which only gave them thirty-six sesterées; and he laid down as a principle confirmed in many decrees, that the original grants or leases (*baux ā cens*) form an inviolable law between lord and copy-

(1) Or Seterée — as much land as a *setier* (12 bushels) of grain will sow.

holder, so that the latter could never prescribe against his lord for property in lands exceeding the measure fixed by the lease.

On the other hand, the miners le Moine contended that the lord high justice not having in time put himself in possession of the sixty-four sesterées formed by the attérissement, and having allowed them or their ancestors to take possession, they had acquired the right of prescription against him by an immemorial possession. By a verdict rendered in the *Senéchausée de Moulin*, on the 22d of August, 1758, the lord was declared to be inadmissible (*non recevable*) in all his demands. This decision was confirmed by the decree of Monday, May 12, 1766, rendered in the second chamber of inquests on the report of M. L'Abbé Terré de Barnay. The decree was founded principally on the method of prescription, opposed to the lord high justice by the miners le Moine.

§ IV. 1. We may follow two different methods in order to come at a division of attérissements among the different riparian proprietors who have a right to them.

2. The first method, which is taught by Barthole, in his treatise *de Fluminibus*, liv. 1, edit. de 1512, tom. 5, pag. 630, *et seq.*, is founded on the principle that each part of the attérissement ought to belong to him who possesses that part of the shore which is nearest to it, so that proximity is made to decide the right.

Thence he distinguishes two different cases.

Either the ancient boundary of two neighboring estates abuts upon a bank, which extends in a straight line.

Or it abuts on the apex of an angle formed by the same bank.

In the first case, to make the division, we must raise upon the bank a line perpendicular to that which forms the boundary of the estates.

In the second case we must draw from the apex of the angle a line which divides it into two equal parts.

It would be difficult to explain here why in the figures which Barthole has inserted in his treatise, the line of demarcation traced on the attérissements which are the object of division, is seen to change its direction sometimes several times. It is a consequence of his principles, which can hardly be understood without the aid of figures.

By following these same principles it often happens that the field which was bathed by the river, finds itself, by the

result of the division, at a considerable distance therefrom; the increase which it receives not extending to the new bank. See in the treatise of the author above cited, the figures 12, 13, 18, and 19.

But there is every reason to believe that Barthole would not have adopted a method which leads to such consequences, if he had considered that on the one hand justice exacts that the dangers and inconveniences incident to the neighborhood of rivers, should be compensated by the advantages which this situation can procure, and, on the other, that nothing can enter into comparison with the loss of this situation, on which depends almost entirely in certain countries, the value of lands. Would it not be indeed a flagrant injustice to make one of the co-sharers lose everything, or almost everything, instead of participating in the good luck which has fallen to all?

3. This injustice is avoided by the second method which we have announced, following which, as well as according to the first, each proprietor takes a share in the attérissement in proportion to the extent of his front upon the bank. This method is as follows:

We must first measure the whole length of the old bank, and calculate how many rods, toises, or feet of front, each riparian owns. It is necessary to count by rods, toises, or feet, as may be required, to avoid fractions in the measure of each particular estate.

Secondly, we add these different quantities of feet, for example, found by the preceding operation, and supposing that the total amounts to 200 feet, we divide the new bank of the river into 200 equal parts, and we apportion to each sharer as many portions of this last bank as he possessed feet on the old one.

Then to make the division, it only remains to draw lines from the old limits of the estates, to the points which, as was just said, form the bounds of the different estates on the river shore.

The lines thus drawn, from the old to the new bank, will be sometimes parallel, sometimes divergent, sometimes convergent, according as the actual river bank has an extent equal to the old bank, or less, or greater. It is easy to see how the course of the river may be lengthened or shortened by a change of direction.

The limits of this work do not permit us to enter into greater detail upon this matter."

Circuit Court of the United States. Massachusetts District. May Term, 1857.

THE SALMON FALLS MANUFACTURING COMPANY *v.* THE BARK TANGIER.

RICHARDSON AND OTHERS, CLAIMANTS.

To constitute a delivery by the master, of goods brought in a vessel from a port in another State to the port of Boston, under the ordinary bill of lading, mere unlivery of the goods and landing them on the wharf is not sufficient; there must also be reasonable notice to the consignee, allowing him time to make the usual and necessary preparations to receive the goods. And it is no delivery to unlade the goods at an unusual time. Thus, where, by the usage of a port, consignees are not in the habit of receiving goods on the day of the annual fast, a notice by the master to the consignee that he shall unload the goods on that day, will not bind the consignee to receive them; and where goods were so unladen, and not accepted or received by the consignee, and were, on the same day, destroyed by fire on the wharf: *Held*, that the loss must fall upon the carrier.

Fire, occurring on the wharf, after goods are landed, is not within the exception of damages of the seas, in the ordinary bill of lading.

Nor is such a fire within the Act of Congress of March 3d, 1851, relieving ship owners from liability for damage by fire to goods on board of vessels, in certain cases.

CURTIS, J.—This is an appeal from a decree of the District Court, in a suit *in rem* founded on a bill of lading in the usual form, signed by the master of the Tangier, at Apalachicola, on the 3d day of March, 1856, for one hundred bales of cotton, to be delivered at the port of Boston, (the dangers of the seas only excepted,) unto John Aiken, the Treasurer of the Salmon Falls Company, to which corporation the cotton belonged.

The District Court decreed in favor of the claimants, and the libellants appealed.

The material facts, which are not in dispute, are, that the bark arrived in the port of Boston on Sunday, the 6th day of April, 1856. On Monday, at the request of Goddard & Pritchard, who were the consignees of the larger part of the cargo, the bark was hauled to Lewis Wharf, and the unlading was begun. At some time between the hours of ten, A. M., and three, P. M., notice was given to Aiken's clerk, at his counting room, that the Tangier had

hauled to the north side of Lewis Wharf, and had commenced discharging. The work of discharging was begun between two and three o'clock, P. M., and continued about two hours. On Tuesday, it was further continued until one o'clock, P. M., when it ceased, because there was not room on the wharf to receive more cargo. It was not resumed on Wednesday for the same reason. On Thursday, which was the day fixed by the proclamation of the Governor of Massachusetts for the annual Fast-day, the work was resumed at seven o'clock, A. M., and prosecuted till one o'clock; at which time the cotton belonging to the different consignees was all out of the vessel, and such of it as had not previously been removed by the consignees, had been separated into lots, according to the various marks, and was ready for delivery. Immediately afterwards, an accidental fire broke out on the wharf, and the cotton was burned. Pursuant to the notice received by the libellants on Monday afternoon, they sent men and teams to the wharf on Tuesday morning, and by one o'clock had removed thirty-five bales, which was all that could be found on the wharf belonging to the libellants. On Wednesday morning, the same men and teams were again sent to the wharf, but only one bale of the libellant's cotton could then be found, and the person in charge of the teams was informed by the mate of the bark that no cotton had been discharged since one o'clock, the previous day, for want of room on the wharf, and he did not know when they should recommence discharging. So that, down to Thursday, there was no want of diligence on the part of the libellants, in acting on the notice given them, and being in readiness to receive all that was in readiness to be delivered.

Sixty-five of their bales of cotton were burned, and the question is, whether it was at their risk, or that of the bark, at the time of the fire.

The bill of lading in this case imports an obligation to carry and *to deliver* the goods, qualified only by the exception of danger of the seas. Fire, occurring on the wharf, after the goods are landed, is not within the exception. *Oliver* v. *The Memphis Ins. Co.* 19 How. 312. *Airey* v. *Merrill*, 2 Curtis's C. C. R. 8.

So that, for the purposes of this case, there was one entire and absolute contract to carry and deliver; and the question is whether it had been performed when the goods were destroyed.

Actual delivery can be made by a carrier only to the consignee, or some one representing him, and who assents to and does receive the goods. But, inasmuch as the liability of the carrier, as such, cannot be protracted by the neglect or refusal of the consignee to receive the goods, an offer to deliver them at such a time and place, and in such a manner, as is required by the contract, accompanied by a present ability so to deliver them, is so far equivalent to an actual delivery, that it terminates the liability of the carrier, as carrier, though a duty of custody and care may, under some circumstances, then arise.

The questions, at what time and place, and in what manner, the delivery may be offered, and how the offer may be made, depend on the usage of the business in which the particular transaction occurs. Stated generally, it may be said to be the usage of the business in which this transaction occurred, for the vessel to be placed at some suitable wharf, and notice given to the consignees of the cargo, of the place where the vessel lies, and that the cargo is about to be discharged. It is then landed and made ready for delivery. The consignees, after receiving such notice, are expected to take notice of the fact that their consignments are made ready for delivery; and as soon as they are so, they are, in judgment of law, delivered, and the carrier's peculiar liability is ended.

Such is the usage in point of fact, and like many other settled usages of commerce, it is recognized by the law, and has become a rule which courts of justice take notice of and enforce. But this rule has several important qualifications. In the first place, it is necessary that the notice to the consignee should be a reasonable notice. By which I understand that it must not so long precede the readiness to deliver, as to impose on the consignee an unusual and unnecessary burden of keeping in readiness to receive and transport his goods; nor, on the other hand, that it should fail to allow the consignee reasonably sufficient time to make usual and necessary preparations to receive and transport them. In the next place, the goods must not only be placed on the wharf—they must be made ready for delivery.

The mere discharge of a cargo is not equivalent to a delivery of the cargo. On the contrary, important rights and interests, both of the ship-owner and the consignees of

the cargo, depend upon the preservation of the distinction between unlading and delivery. This is well illustrated by the case of *Certain Logs of Mahogany*, reported in 2 Sumner, 589. In that case, the cargo was libelled for freight due under a charter-party, which made the freight payable "in five days after the brig's return to *and discharge in* Boston." It was insisted that this displaced the lien; because it showed that a credit was to be given after the cargo should be delivered. Mr. Justice Story held otherwise. He considered that not only were discharge and delivery distinct from each other, but that the consignee had a right to have his goods landed, and so placed that he could ascertain their condition before he made himself liable for the freight; and that the master had the right to unliver the cargo, and still retain it in his own possession, until the freight should be paid. Such is the maritime law of England and France, as well as of this country. See also *Ostrander* v. *Brown*, 15 Johns. 39; where it is expressly laid down that landing on a wharf is not delivery.

If we consider the grounds upon which the law terminates the liability of the carrier without an actual delivery, it will be apparent that mere unlivery is not sufficient. Those grounds are, readiness to deliver, accompanied by such an offer to deliver as the consignee is bound to act upon. If the carrier is not ready to deliver, it is of no importance from what cause such want of readiness proceeds. Whether it be because the goods are still in the vessel, or because they are so mixed with others on the wharf that they are not accessible, or because the master intends to insist on his lien for freight, or for an average bond, is immaterial.

If he is not ready to deliver, the law does not deem the delivery made, and he must be ready to deliver at such a time as the consignee is bound to receive his goods. The law does not allow the carrier's liability to be protracted by the neglect or refusal of the consignee to receive his goods. But until there is some neglect the principle does not apply. All will agree that if the master be ready to deliver on Sunday, or in the night time, such readiness cannot avail; for there is no duty incumbent on the consignee to receive goods at such times, and consequently no neglect on his part.

These principles, when applied to the facts shown in evidence, are sufficient to determine this case.

The sixty-five bales of cotton belonging to the libellants, which were destroyed, were made ready for delivery on Thursday, the tenth of April. That was the day of the annual Fast. The evidence is decisive that it was not usual for consignees to receive goods on that day. A large number of merchants, custom-house officers, wharfingers, and port-wardens have been examined; their testimony covers a period of more than twenty years, and embraces an ample amount of knowledge of the business in which this transaction occurred. And it clearly shows that the annual Fast, during the entire period, has been a day when merchants do not receive consignments of goods.

It is also proved that in frequent instances, when the discharge of a vessel has been left incomplete, it has been completed on the Fast-Day; though this practice seems to be limited to goods not perishable; and the reason assigned for not landing perishable goods on that day is that consignees do not take away their goods on that day.

There is no inconsistency in these courses of business, nor any conflict of rights growing out of them. The time when the cargo is discharged is at the will of the master. He may unlade it and make it ready for delivery on the Fourth of July, or in the night-time, if he chooses so to do. And he may unlade it without notice to the consignee. But such an unlading and preparation to deliver, are not equivalent to a delivery, because there is not such reasonable opportunity for the consignee to receive his goods, and such neglect of that opportunity, as the law puts in place of an actual delivery.

The practice to complete the discharge of vessels on the Fast-day, may satisfactorily show that it is a reasonable and proper act. It may justify the master as between him and the owners of the vessel. And so, many emergencies might justify him in discharging in the night-time, or even on Sunday. In the absence of all other evidence, proof of a usage to complete discharge on the Fast-day, might also be sufficient to show that it was a usual and reasonable time to make delivery; because the reception of goods usually takes place on the day when they are discharged. But the proof is direct and clear that the Fast-day is not a usual time for the delivery of the goods.

Taking the entire evidence into view, it comes to this: The master, may, if he please, discharge on the Fast-day;

but he does so with the knowledge that there will be no delivery of them till the next day; because a discharge and readiness to deliver are not a delivery, and do not become so, until some usual time arrives for the consignee to attend for the purpose of receiving his goods.

It was strongly urged that the observance of the Fast-day is purely voluntary; that there is no legal obligation to observe it; and that to deprive the master of the power to offer a delivery on that day, would compel him to observe the day, and thus trench on his legal right to work on that day, if he choose to do so. But the same argument would apply to the Fourth of July, which I believe is universally kept as a holiday. And the answer to it in that case, as well as in the case at bar would be, that all who engage in a particular business must conform to the reasonable and lawful usages of that business; that what is usual in respect to times and places and modes of doing business, in the absence of any rule of law to the contrary, becomes a rule which all concerned are understood to assent to when they engage in that business; and that, for a master to insist that a consignee should not observe a particular day, usually observed by consignees, would deprive the consignee of a right of choice, secured to him by the usage, and by the implied consent of the master himself.

After the fullest consideration, I am of opinion that these goods were destroyed before the time had arrived for the consignee to receive them; that consequently there was no delivery in point of law, and the vessel is liable for their value, unless relieved by the first section of the act of Congress, of March 3d, 1851, 9 Sts. at Large, 635.

This section is copied from the second section of the Act of 26 Geo. 3, c. 86, which received a judicial interpretation by the Court of Queen's Bench, in *Morewood* v. *Pollok*, 18 Eng. Law & Eq. 341. It was there held that the Act did not extend to the case of a fire occurring on board a lighter, in which cotton was being conveyed from the vessel to the shore. This decision is in conformity with the language of the act, which limits its operation to fire happening to or on board of the vessel. Without a departure from the plain meaning of the words of the Act, I cannot extend it to a fire happening on shore.

The result is, that the decree of the District Court must be reversed, and a decree entered in favor of the libellants for the value of the cotton and costs.

DAVID GODDARD AND AL. *v.* THE BARK TANGIER.

JOHN H. PEARSON *v.* THE SAME.

A clerk, as such, has no authority to bind his employer by an agreement to receive goods from a carrier at an unusual time, as upon the day of the annual fast.
Nor has a truckman, as such, that authority.

CURTIS, J.—This libel is founded on another bill of lading of cotton, brought by the Tangier, and destroyed at the same time as that of the Salmon Falls Company.

The circumstances relied on to distinguish this case from the last, are, that the mate of the bark testifies that, on Wednesday, he informed Solis, a clerk of the libellants, who had charge of receiving and taking away their cotton, that the stevedore would work on Thursday; and that Solis replied, if the stevedore worked, he should. Solis admits that something like this was said, but that he qualified it by saying he would work if the men were willing to do so, and Mr. Appleton would open the store into which they were putting the cotton. He also testifies that he subsequently told the mate he should not take cotton the next day, because Mr. Appleton would not open his store.

Assuming that both the witnesses intend to tell the truth, and that each has related what rests on his memory, and I see no cause to doubt the honesty of either of them, the fair result of the evidence is, that at one time, Solis led the mate to expect he would work on the Fast-day, but afterwards informed him he should not. And this is confirmed by the evidence of McDonald, who says the mate told him, on Thursday morning, Solis would not be down that day. McDonough says he heard this said by the mate; and Clifford says he heard Solis tell the mate he should not work on Thursday. The master also testifies, "I told Solis, in the course of conversation, on Wednesday, that we should work on Fast-day; he said they would take it all away; that they had plenty of stores then." He also testifies that when he applied to Mr. Goddard, on Wednesday, to hasten the removal of the cotton, Goddard referred him to Solis, as having charge of the removal. It is material to observe that neither the master nor the mate say that they were influenced in their action by what Solis said. On the con-

trary, each informed him, before he had said anything on the subject, that the work would proceed on the Fast-day. Still it is competent for a consignee to agree to receive his goods at an unusual time, when he is not bound to receive them; and if he should so agree, and they should be made ready for delivery at the agreed time, I think the liability of the carrier would be terminated. But there is no evidence that the libellants themselves agreed to receive their goods on the Fast-day; and I do not find proof of authority in Solis to make such an agreement for them. All that appears is, that he had charge, as a clerk, of the receipt of the cotton. This must be understood to be an authority to receive it in the usual course of such business. He had no power to bind his employers by an agreement to depart from the usual course of business, and put the cotton at their risk at a time and under circumstances when it would in the usual course of business have remained at the risk of the carrier. Suppose he had agreed to receive it in the night-time, or on Sunday, would this have affected his principals? And he had no better authority to agree to receive it at one unusual time than at another.

Something was said at the argument respecting the fact that a part of the cotton, which was landed on Tuesday, belonged to Goddard & Pritchard, and was burned. But I do not think it appears that any part which was accessible on Wednesday, was allowed to remain. On the contrary, it is shown by the libellants that they had ample storage room, and sufficient men and teams employed on Wednesday, to have removed all their cotton; and that the men ceased work between four and five o'clock, P. M., because they could find no more of the libellant's cotton on the wharf. If any was there, it was so mixed with other cotton as not to be accessible, with reasonable efforts, and consequently was not ready for delivery.

In the case of Pearson, the alleged agreement of the truckman to truck cotton on Thursday, if proved, of which I have doubt, cannot avail the claimants. A truckman, as such, has no authority to bind a merchant to receive goods at an unusual time.

The result is that the decree of the District Court must be reversed, and a decree entered for the value of the cotton lost, with costs.

C. B. Goodrich and *C. P. Curtis, Jr.*, for the libellants.
R. Choate and *J. M. Bell*, for the claimants.

The Ship Middlesex.

To constitute a good delivery of goods brought in a general ship from a port in another State to the port of Boston, under the ordinary bill of lading, mere unlivery of goods and landing them on the wharf is not sufficient, without a reasonable notice by the master, or some one acting for the owners, to the consignee that the goods will be so unladen. A knowledge casually acquired by the consignee that the vessel has arrived and will discharge at a particular wharf, will not excuse such notice.

It is not a good delivery of cargo to a consignee to pile it upon the wharf promiscuously with goods of other consignees. The master must, as far as possible, separate the different consignments, and assist in rendering them accessible to their respective owners.

A usage for wharfingers to act as agents in accepting, on behalf of consignees, goods arriving at the several wharves, would not be a good and valid usage.

Curtis, J.—This case depends on a part of the same principles as the three preceding cases, though its facts are not the same.

It is a libel founded on a bill of lading in the usual form, signed by the master of the ship Middlesex, at New Orleans, on the 19th day of March, 1855, agreeing to deliver sixty barrels of lard at the port of Boston, unto the libellants, or their assigns, dangers of navigation only excepted.

The ship arrived in the port of Boston, on Saturday, the 21st day of April, 1855, and commenced discharging cargo on Tuesday, the 24th. On Thursday, about five o'clock P. M., a small part of the libellants' merchandise was discharged; and in the course of Friday, before half past two o'clock, thirty-one barrels thereof had been landed on the wharf. They came out promiscuously with other merchandise, and were so stowed on the wharf. It does not appear that at any time any considerable quantity was accessible, so that it could have been taken away by the libellants.

No notice of the arrival of the vessel and that her cargo was about to be discharged, was given by the master to the libellants. But Wilde, a clerk of the libellants, without any direction to that effect from his employers, went to the vessel, on Wednesday or Thursday, and enquired of the mate if the merchandise was ready for delivery; he replied, it was not, and he could not tell when it would be. He then asked the mate if he would notify the libel-

lants' when the merchandise should be ready, and the mate said he would. He thereupon gave the mate the libellants' business card, and asked him if he knew where the libellants' place of business was; the mate took the card, and said he did, or ought to, for he was a "North End boy." The fact that the vessel was at Battery Wharf, and the result of this interview with the mate, was made known to the libellants, by Wilde, on the day when it occurred. The Mate denies that he made an absolute promise to give notice; but I do not deem this material, because the libellants were informed that he did.

So much of this merchandise as had been landed on Friday, was destroyed by an accidental fire which broke out on the wharf about half past two o'clock on that day.

Upon this state of facts I do not think the notice of readiness to deliver, required by law, was given. When the master, or the owners, or consignees of the vessel give notice to consignees of cargo that the vessel is about to discharge at a particular wharf, it is deemed equivalent to a declaration by him or them that the master will be in readiness to deliver the cargo there at some proper time, as soon as, by the use of due diligence, he can get it out of the vessel in a state to be delivered. But mere knowledge that the vessel has arrived and is discharging, at a particular wharf, gained in some casual manner by the consignee, without any act on the part of the master, to indicate a readiness to deliver, is not within the usage, which is for the master, or some agent for the vessel, to give notice to the consignees. And I do not think such casual knowledge is sufficient to impose on the consignee the duty of attending to the discharge of the vessel, and being in readiness to receive his goods as soon as they are ready for delivery. I think a consignee of cargo may well say, "I knew it was usual for some agent of the vessel to give express notice to consignees. No such notice was given. I inferred that for some cause the master would not be ready within a reasonable time to deliver my cargo—and I consequently made no preparation to receive it."

It must be remembered that it is not knowledge of the arrival of the vessel and that she is discharging, but notice of the readiness of the master to deliver, which is the operative fact. And to convey this notice the master, or some one acting for the vessel, should give such notice, or some notice, which by custom is equivalent to it.

In this case the libellants, at the same time when they were informed by their clerk, that the vessel was discharging at Battery Wharf, were also informed that the mate could not tell when their merchandise would be ready for delivery and had engaged to give them notice when it should be ready. I do not think the mate had authority to bind the vessel by this engagement. But I consider that these circumstances are material when coupled with the want of notice by any one representing the vessel; and that the libellants were not bound to make preparations to receive their consignment until they had some further notice.

But there is another ground on which, in my opinion, this case must be decided in favor of the libellants. Their consignment was but a very small part of the entire cargo of the vessel. The part of it which was landed, was stowed on the wharf promiscuously with the residue of the cargo. I do not think the consignee of a parcel of merchandise is required to overhaul the residue of the cargo on the wharf, to find his goods. For the convenience of the vessel a particular consignment may be stowed in any proper place in the vessel, and even mingled with goods belonging to others, and it must come out as it is reached in the process of unlading. But each consignee has a right to have his goods delivered to him separately from all others; and the duty of separating them from all others is part of the duty of delivery. No doubt there must be, as in practice I believe there is, a reasonable coöperation between the master and the consignees of cargo in the process of delivering it, and especially in cases of general ships, of large tonnage, such as are now employed. The consignee cannot justly expect, and cannot lawfully require, that upon a crowded wharf, where a large cargo is being delivered to numerous owners, each consignment should be set apart by itself, and so placed as to be most easily accessible. That should be done which may be done reasonably and is usually done in similar circumstances. But there is no evidence in this case to show, and it is not to be presumed, that all that is usually done by the master in a case like this, is to pile thirty-six barrels belonging to a particular consignee promiscuously with other cargo discharged on four different days. I cannot say that, when so placed, the libellants' goods were ready for delivery, and, therefore, I hold that their contract for delivery had not been performed when the fire took place.

It was urged in the case, that as it appears to be the usage for consignees to pay wharfage on their goods, the wharfinger is the agent of the consignees to accept a delivery of the goods, and, consequently, as soon as landed on the wharf the goods are delivered to the consignee. I suppose the usage mentioned is, for consignees who accept goods to pay their wharfage; and for consignees who do not accept goods not to pay it. I do not believe there is any usage which makes wharfingers the agents of the consignees to accept consignments for them; and if such a usage were proved, I could not admit that it was a reasonable or lawful usage. It would be inconsistent with the nature of the employment, and would lead to too much confusion of rights to be tolerated. The acceptance of the goods by the consignee, independent of any usage, may be sufficient to raise an implied promise to pay their wharfage; and the usage spoken of is probably nothing more than a practical conformity to those rights and duties of the parties which grow out of the rules of law. That, in my opinion, landing is not delivery, I have already stated in the case of the Salmon Falls Company.

It was also insisted that the consignees could not maintain a libel founded on the bill of lading alone, without some further evidence of their ownership of the goods. I consider this question to have been settled in the case of *Lawrence* v. *Minturn*, 17 How. 100. The same was held at common law, in *Tronson* v. *Dent*, 8 Moore's Privy Coun. 419.

The decree of the District Court must be affirmed, (1) with six per cent. damages and costs.

J. P. Healy, for the libellants.

R. H. Dana, Jr., and *H. A. Scudder*, contra.

(1) This case was decided in the court below by Judge Sprague; the three preceding cases were decided by Judge Ware, sitting in the District of Massachusetts.

United States District Court.

JOHN A. CUNNINGHAM, ET. ALS., LIBELLANTS., *v.* SAMUEL HALL, RESPONDENT.

Where one contracts to make and finish a specific article, as, for instance, a ship, he impliedly undertakes that the thing shall be reasonably fit for use.

Where the contract was for the making and delivery of a ship, and the ship was made and delivered, and immediately sailed on a foreign voyage, and it was found upon examination at one of the ports at which she arrived in the course of that voyage, eight months after her delivery, that the planks on her bottom were very much split, and she had leaked much in the course of the voyage, and had met with no disaster or strain sufficient to account for the damaged state of the planks, it was *held* that the evidence was sufficient of the vessel having been improperly built, and not reasonably fit for use.

SPRAGUE, J.—This libel is brought by the owners of the ship Flying Childers, to recover the expenses of repairing the ship, demurrage, &c., incurred in consequence of her leaking on her first voyage, so that on arrival in China it was necessary to put her into dock, take off the copper, when it was found that several planks on her bottom were so badly split that they could not be made tight by caulking, and it was necessary to take them out and put in new, and her seams were generally so slack as to make it necessary to caulk them all over.

The contract for the building of the ship is contained in letters, making a proposal for the ship after it was partially built, and the respondent's acceptance.

The respondent contends that this was merely a contract for the exercise of professional skill and labor; the libellants on the other hand, say that it was a contract for the manufacture of a fabric.

There can be no doubt about the nature of the contract. It appears that, when made, the ship was partially built, and the price to be paid was a round sum. The order was for the ship, and Mr. Hall, by accepting the proposal, agreed that "it should be right in all respects." It was a contract for a particular thing. So the rules of law relating to the exercise of professional skill are not applicable.

The next question is, what was the obligation of Mr. Hall. The case of *Shepherd* v. *Pybus*, 3 M. & Gr. 868, is

not distinguishable from this, and that settles the law, that the ship must be reasonably fit for use, and the same rule is laid down in other cases.

It is attempted to distinguish these from the present, on the ground that the articles were there ordered for some special purpose. But this only extends the rule. When additional qualities are required for a special purpose, the maker is bound to furnish them, it does not in any case restrict the rule. The rule of law applicable to this case is that the fabric shall be reasonably fit for use, and not merely that the maker will use his best skill to make it so. He in fact warrants the accomplishment of that result.

The libellants impute no want of skill, care, attention, or good faith, and admit that the ship was well and strongly built, and was good in all respects but the particular ones complained of.

The ship was launched in November, sailed in December, immediately began to leak, and in July leaked so much that it was necessary to take her into dock and strip the bottom, when it was found in the condition before stated; and the complaint made is that some of the planks used were originally defective, and that the caulking was not sufficient.

There is no contradiction as to the state of the bottom at Whampoa, though the witnesses differ somewhat as to details. The testimony of Cowper, the shipwright, is entitled to more weight, as it was originally taken to be used by the respondent, and is not materially affected by the testimony of his subsequent declarations.

This being the state of the vessel, how is it to be accounted for?

Several reasons are given. One is that hard pine planks are liable to defects which cannot be discovered on careful examination, such as heart-shakes, run round shakes, &c., which do not come to the surface, and which are opened by the nails used in coppering. Evidence shows that this is not infrequent, and the suggestion would be entitled to weight if the rule of law applicable was that for which the respondent contends; but if the fact were proved, I think the respondents must nevertheless be liable.

Heaving out, touching bottom at Boston and San Francisco, gales of wind and other causes are suggested.

The only evidence of her taking ground in Boston is the incidental mention of the fact by the mate in his deposition, taken two years ago. He was not cross-examined by the respondent in relation to it, and no expert has been inquired of as to its effect; so it is evident that the respondent did not consider that a sufficient cause, and the same may be said of the touching at San Francisco. There is no proof that this could account for the state of the bottom at Whampoa, and the leak began long before she arrived at San Francisco. As to gales at sea, the master and mate testify strongly that she never did strain, and that she encountered no weather sufficient to strain her, that the leak was steady and gradually increased. The log book does not corroborate their testimony as to the gradual increase of the leak, but does as to its occurring immediately after sailing. Pumping is not always mentioned, and the account given of the weather is much stronger. But it is to be remembered that the log book and protest are the usual proof of loss where claims are made on insurers, and it is to be expected that the accounts of gales, seas, &c., will therein be stated, at least as strongly as the truth will admit. It does not mention that any accident or damage happened, or that the ship strained, or carried away even a spun-yarn. I cannot therefore set aside the testimony of the master and mate, especially as, when examined at Whampoa, no sign of straining appeared on the bottom, and the copper was so smooth and unwrinkled that it was put on again, which is evidence of the most conclusive nature that she had not been strained.

As to the heaving out, as the vessel was not coppered on the stocks, it was known that it must be put on afterwards. It is argued that this was an unfair use of the vessel, and subjected it to unusual tests, &c. But Mr. Hall put on the copper. The vessel was hove down, if not by him, under his eye and with his knowledge, and no complaint was made by him at the time that she was to be hove out, or of the manner in which it was done, and at that particular time the copper could not have been put on without it. There is no proof that she was strained in the process, and the weight of testimony is that, if carefully done, a good vessel ought not to be strained in heaving out, and that splits in the bottom plank could not be caused by it, and that a ship ought to be able to bear it.

Railways, dry docks, &c., are inventions of recent years, and are not now to be found in many places where vessels are built and repaired.

I am of opinion therefore that the condition of the bottom plank seams at Whampoa is not satisfactorily accounted for by any cause suggested, and must be attributed to original defects; that in consequence the ship needed expensive repairs within eight months after she was launched and delivered, that therefore she was not then reasonably fit for use, and the libellants are entitled to a decree.

The case must be sent to an assessor, to ascertain the amount of damages, unless the parties agree the amount.

F. C. Loring, for libellants.

R. Choate and *C. P. Curtis, Jr.*, for respondents.

March Term, 1858.

[Reported by A. S. Cushman, Esq.]

The Schooner Julia Ann.

The United States marshal having process against a vessel, found a man in possession, who said he was keeper of the vessel while another man who had been put in keeper by wreckers was gone to dinner. This underkeeper in fact held under a warrant from the sheriff of Nantucket, but did not disclose that fact to the marshal, nor make any claim to hold by virtue of it. He consented to hold under the marshal, and received written authority from him. When the keeper returned, he gave back the sheriff's warrant, and told the sheriff that he was holding for the marshal, and showed his authority. The sheriff replied that he knew nothing about the marshal, and told him to keep on. He remained in possession until a sale by order of this court, there having been no appearance in the case by the sheriff or on his behalf. *Held*, that there was a waiver of possession on the part of the sheriff, and possession obtained with his knowledge and consent by the marshal.

It seems that the cabin of a deserted vessel which comes within this State temporarily, is not the "last and usual place of abode" of the master, within the meaning of the Act of Massachusetts of 1837, ch. 185, prescribing the service of applications for appraisal and sale.

This was a libel brought to obtain possession of the schooner Julia Ann, lately of Orrinton, Maine. At the hearing it was proved that on the 16th day of October, 1857, the sheriff of Nantucket took the said schooner into his custody, under a writ of attachment in favor of certain wreckers, and placed a keeper on board. That on the 26th

of the same month the United States marshal, with a warrant and monition against the said schooner, issued upon a libel filed in this court by the seamen for wages, proceeded to Nantucket, and found a person on board who said he was keeper of the vessel while another man who had been put in keeper by the wreckers had gone to dinner; that the marshal informed him that he was directed by his precept to take possession, and that he wanted a keeper. The keeper on board consented to receive a keeper's warrant from the marshal and hold under him. That the marshal was not aware and was not notified that the keeper was a sheriff's bailiff, nor that she was in possession of any person claiming to hold her by virtue of the process of any court, and made return that he had taken the vessel into his custody pursuant to his warrant. On the day following the arrest by the marshal, the second keeper informed the sheriff that the marshal had arrested the vessel and put him in keeper, and he produced the written authority or warrant given him by the marshal. The sheriff replied that "he did not know anything about the marshal," and told him "to keep on."

A decree was entered upon an *ex parte* hearing for the seamen's wages and a warrant for sale issued by order of court. About twenty-five minutes before the time appointed for the sale, the sheriff put into the hands of the marshal a paper protesting against the contemplated sale, and claiming that he held the possession under said writ of attachment. At the time and place fixed in the warrant of sale, the marshal sold said vessel by public auction to the respondents, who have held possession until the filing of the present libel. The sale was made upon the deck of the vessel, in the presence both of the sheriff and of the present libellant, who was attorney for the plaintiff in the writ of attachment, who made no objection to the sale, and gave no notice to the respondents or other persons that they had any claim upon the vessel.

On the first day of December following, the present libellant purchased the same vessel at a sheriff's sale, made under the provisions of the Revised Statutes of this State, chap. 90, sects. 58, *et seq.*, which provides for an appraisement and sale of property whenever an attachment is made of "any goods and chattels which are liable to perish or waste, or to be greatly reduced in value by keeping, or

which cannot be kept without great and disproportionate expense." Application was made by the plaintiff to the attaching officer for such appraisement, and notice thereof was given by leaving such notice in the cabin of the vessel, as the last and usual place of abode of the master, one of the defendants; and another notice was left at the former boarding house of the mate, as being the last and usual place of abode of an agent or attorney; and a third notice was left with a "supposed" agent and attorney. The evidence showed that the master deserted the vessel, and left Nantucket, after the attachment by the sheriff and before notice of the application for appraisement. The mate, who had charge of the vessel in the absence of the master, had also left Nantucket before said notice was served. And it was not shown that the third person with whom notice was left had been agent or attorney for either of the absent defendants. Three appraisers were appointed, one by the creditor in the suit, and the other two by the sheriff, — he appointing one in behalf of the debtors,—and made return that they had neglected to appoint an appraiser.

The remaining facts appear in the opinion of the Court.

SPRAGUE, J.—The libellant claims the possession of this vessel, which he avers is wrongfully withheld from him; and he being out of possession must maintain his claim by showing a better title than these respondents who held possession at the time of filing the present libel. This claim is founded upon a sale made by a sheriff under the provisions of the Revised Statutes of this State for the sale of property when expenses of keeping it would be great and disproportionate. The statute provides for an application for such sale to be made to the sheriff, who is to give notice thereof to the parties interested. Chapter 185 of the Acts of 1837, provides that such notice, in case the defendant is not within the Commonwealth and has no attorney therein, shall be in writing, and left at his last and usual place of abode within the Commonwealth, if he has any, otherwise it shall be left at the dwelling house or place of business of the person who had possession of the property at the time of the attachment; and that such notice so served shall be sufficient notice to the defendant to authorize an appraisal and sale. Where the defendants are not within the Commonwealth, in the absence of personal notice, compliance with this provision of the statute is necessary to render

the subsequent proceedings of appraisement and sale of any force and validity. This is a sale by an executive officer, not by the order of any court, but under a statute, and it is necessary that he should have complied with its various provisions in order to confer a title. His decision is not a judicial determination, but ministerial, and does not preclude this court from inquiry as to the regularity of his proceedings, or from going behind his return. I am not prepared to say that the cabin of a deserted vessel which comes into the State temporarily can be properly called the last and usual place of abode within the meaning of the statute. The mate was no party to the suit, was not in possession of the property at the time of the attachment, and had left his temporary boarding house before the notice was left there. The third person to whom personal notice was given, the officer returns as a "supposed" agent; but it does not appear that he was correct in his supposition, and that notice to him availed anything. The defendants were not within the State, and no notice was given them of this contemplated appraisal and sale of their property. Yet the sheriff returned that they had neglected to appoint an appraiser, and proceeded to appoint one in their behalf. I have great doubts whether the proceedings under the statute were regular, so that a sale by the sheriff could confer a title.

Without, however, deciding this point, which rests upon the construction of a State statute, if the respondents had already obtained a title under a sale ordered by this court, having jurisdiction *in rem*, then though there had been sufficient notice to the absent defendants in the State Court it could not impair such title of respondents. The question depends upon whether this court had jurisdiction upon which to base its decree and order of sale. In order to prevent a conflict for possession between executive officers of different courts having concurrent jurisdiction, the practice has been settled that this court will not order the arrest of property which is in the custody of an executive officer acting under the authority of a State tribunal having jurisdiction.

This vessel was within the District of Massachusetts, in the custody of the sheriff of Nantucket. Although in his precinct, the marshal could not take possession under his process without the consent of the sheriff. The keeper

stands in the place of the sheriff, and may yield up possession to the marshal so as to render the service of his process legal. This keeper was temporarily in charge of the vessel, under the keeper appointed by the sheriff, and had a writing showing his authority to hold her. But he did not disclose that fact to the marshal, nor make any claim to hold her by virtue of it. He consented to hold her under the marshal, received written authority from him, held her until the sale by him, and received full fees therefor as his keeper. When the person returned whose place he had taken, he informed him that he had been appointed keeper by the marshal and returned to him the sheriff's warrant. And when he told the sheriff that he was holding for the marshal, and showed his written authority for that purpose, the sheriff did not oust him nor forbid him, but replied that he did not know anything about the marshal, and told him to keep on. Neither the sheriff nor any other person appeared in this court to represent his interest or to claim that the *res* upon which it was acting was either in his custody or that he had been deprived of it without his consent, and suffered this court to proceed to a decree and order a sale.

I am satisfied that there was a waiver of possession on the part of the sheriff, and possession obtained with his knowledge and consent by the marshal, so that this court had jurisdiction, and that the sale made by its order conferred a valid title upon these respondents. The libel is therefore dismissed with costs.

David Thaxter, for libellant.

H. A. Scudder, for respondents.

Supreme Judicial Court of Massachusetts. Suffolk County. March Term, 1858.

AUSTIN *v.* HARRIS.

Agreement to assign lease.

An agreement by a lessee to assign his lease is not complied with by an assignment duly executed by him, but not assented to by the lessor; the consent of the lessor though not mentioned in the agreement to assign being made essential by the lease to a valid assignment thereof.

H. C. Hutchins, for plaintiffs.

Smith & Rollins, for defendant.

BASS *v.* HAVERHILL INSURANCE COMPANY.

Appeal from Common Pleas.

No appeal lies to this court from a general judgment of the Superior Court or Court of Common Pleas, on a case submitted to that court upon the facts, as well as the law under St. 1857, c. 267; as when depositions are submitted with authority to the court to draw inferences of fact.

W. Brigham, for plaintiff.

F. W. Hurd, for defendant.

BOSTON & MAINE RAILROAD *v.* BARTLETT.

Equity.—Specific performance.—Lapse of time.

Specific performance of a contract for the conveyance of lands will not be decreed in equity on a bill filed three years after the time when the lands should by the contract have been conveyed, if the plaintiff in the meantime takes no steps to enforce the contract, and shows no reason for his delay.

G. Minot, for plaintiff.

J. P. Healy, for defendant.

COMMONWEALTH *v.* GRIMES.

Indictment.—Larceny.—Description of bank bills.

An indictment for stealing bank bills sufficiently describes them as "sundry bank bills of some bank respectively to the said jurors unknown of the amount and value in all of thirty-eight dollars of the property, goods and chattels" of a person named.

J. H. Bradley, for defendant.

S. H. Phillips, (att'y gen'l) for Commonwealth.

COMMONWEALTH *v.* JENKINS.

Corroboration of witness.

On the trial of an indictment for receiving stolen goods, the thief, being called as a witness for the Commonwealth, testified on cross-examination, that he gave a different account of the transaction in his testimony before the Police Court from that given by him at this trial.

Held, That the Commonwealth could not, for the purpose of corroborating his testimony, be allowed to show that on another occasion, previous to said examination, and when not under oath, he had made a statement substantially like that made on this trial.

J. G. Abbott, for defendant.

S. H. Phillips, (att'y gen'l) for Commonwealth.

COMMONWEALTH *v.* SKELLEY.

"Tenement" under St. 1855, *c.* 405.

In an indictment under St. 1855, c. 405, for using a tenement in such a manner as to be a common nuisance, the word "tenement" is a sufficient description.

G. Sennott, for defendant.

S. H. Phillips, (att'y gen'l) for Commonwealth.

COMMONWEALTH *v.* O'HARA.

Larceny.—Pledged goods.

Property pledged and in the possession of the pledgee may be described in an indictment for stealing it, as the property and in the possession of the pledgor.

B. F. Butler & N. St. J. Greene, for defendant.

S. H. Phillips, (att'y gen'l) for Commonwealth.

COMMONWEALTH *v.* PRICE.

Testimony of accomplice.—Counterfeit bills.—Intent to pass in another State.—Venue.—Privilege of witness.

A jury may convict on the uncorroborated testimony of accomplices, but it is a salutary rule that they be strictly cautioned.

The possession of bank bills, knowing them to be counterfeit, and with intent to pass them in another State, is a punishable offence under Rev. Sts. c. 127 § 8.

The indictment charged the defendant with the possession of counterfeit bills at Boston "with intent then and there to pass the same." *Held*, that the words "then and there" refer to the intent, and not the time and place of the intended passing.

If a government witness consents to testify at all so as to criminate himself as well as the defendant in the matter on trial, he cannot afterwards interpose his privilege, but must answer all questions legally put to him concerning that matter.

B. F. Butler & N. St. J. Greene, for defendant.

S. H. Phillips, (att'y gen'l) for Commomwealth.

COMMONWEALTH *v.* THOMAS.

Indictment.—Counterfeit bills.—Promissory note.

Under an indictment for having in his possession and uttering five promissory notes, the defendant may be convicted of having in his possession and uttering one promissory note.

A bank bill of another State is a promissory note within the meaning of Rev. St., c. 127, § 4.

J. C. Park, for defendant.

S. H. Phillips, (att'y gen'l) for Commonwealth.

COMMONWEALTH *v.* WOODS.

Counterfeit note.—Variance.—Evidence before grand jury.

An indictment for having in possession, with intent to pass, a counterfeit note, is supported by proof of having in possession, with intent to pass a genuine note altered.

It is not a fatal variance in setting out a bank bill according to its tenor to substitute "cashier" for "cash'r."

It is no defence to an indictment that no witnesses were examined concerning the crime charged in it before the grand jury at the term at which it was returned, the same grand jury having found a similar indictment upon an examination of the facts at a previous term.

B. F. Butler & N. St. J. Greene, for defendant.

S. H. Phillips, (att'y gen'l) for Commonwealth.

GORMAN *v.* WHEELER.

Principal and agent.

A consignee having taken a note for goods sold on behalf of a consignor, residing in another State, and having given notice to his principal of his having taken the note and of the subsequent insolvency of the purchaser, does not, by proving the note against the estate of the purchaser and receiving a dividend thereon, without express authority from his principal, render himself liable for the amount thereby lost to his consignor, if he acted with due prudence.

E. D. Sohier & C. A. Welch, for plaintiff.

H. F. Durant, for defendant.

HOUGHTON *v.* WILSON.

Officer.—Arrest on execution.—Escape.

An officer who arrests a judgment debtor upon an execution for costs, and, the jailer refusing to receive him, suffers him to return home, cannot arrest him again on the same execution.

J. C. Park, for plaintiff.

W. L. Burt, for defendant.

HOYT *v.* ROBINSON.

Trustee process.—Scire facias.

It is no defence to a *scire facias* against a trustee in foreign attachment, that the funds in his hands were held by him jointly with his copartner. Such a defence should have been made in the original suit.

H. C. Hutchins, for plaintiff.

A. H. Fiske, for defendant.

KINSLEY *v.* RICE.

Suit against directors of insurance company.

The holder of a policy made when the company is already under liability for losses to an amount equal to its capital, cannot sue the directors of the company under Rev. Sts. c. 37, § 18, until after recovering a judgment against the corporation.

C. T. & T. H. Russell, for plaintiff.

E. Merwin, for defendants.

KITTREDGE *v.* PEASLEE.

Contract — Notice — Quantum meruit.

A party who uses the private railroad of another under a claim of right, after notice from the owner that if he continues to use it he must pay one half of the repairs, is not liable for such repairs, but only on a *quantum meruit* for the use of the road.

H. C. Hutchins, for plaintiff.

C. P. Judd, for defendant.

MERIAM *v.* SEWALL.

Proceedings in insolvency.

A decree of this court affirming the validity of proceedings in insolvency, made on the petition of the insolvent to set them aside, is binding on all creditors of the insolvent who had notice of the petition. That suit should have been, in form, a suit in behalf of all parties interested, and notice should have been issued accordingly; and although that course was not pursued, still the creditors who had actual notice might have been admitted to litigate the former suit.

J. G. King, for plaintiff.

W. Brigham & Jennison, for defendants.

TWYCROSS *v.* FITCHBURG RAILROAD COMPANY.

Landlord and tenant — "Taxes and duties," what are.

"Taxes and duties levied or to be levied," which a lessee is to pay, do not include an assessment lawfully laid by a city for building a sidewalk.

H. D. Austin, for plaintiff.

M. G. Cobb, for defendant.

WASS *v.* BARTLETT.

Arrest on execution.

A judgment debtor who has been arrested on execution and taken before a magistrate, and refused the poor debtor's oath, and therefore committed to jail, is entitled to give bonds for the jail limits, under St. 1855, c. 444, § 7.

WILLEY *v.* FREDERICKS.

Damages on building contract.

In an action for neglecting to build the wall of a wharf according to contract, the plaintiff may recover, as an element of damage, the loss of rent of the wharf thereby occasioned.

T. Willey, pro se.

G. H. Kingsbury, for defendant.

WINSHIP *v.* NEALE.

Practice act — Tort in nature of trover — Possession.

In an action of *tort* under the practice act for the conversion of property, the plaintiff must show that he had the right of immediate possession.

D. H. Mason, for plaintiff.

A. A. Ranney, for defendant.

LEEDS *v.* WAKEFIELD.

Power coupled with trust.—Execution of power.

A testator devised the rents and profits of his real estates to his wife, for life, charged with the support of his three sons during minority, and of his daughter, while unmarried.

He further provided, that if his wife should die before all his children had arrived at full age, his executor should

take possession of his real estates and receive the rents as long as any of his children remained under age, and appropriate the income, or so much as should be needed, to the support of such minor child or children; and when all his children should be of age, (their mother being dead,) his executor should proceed to sell the estates, "consulting and advising, however, with my said children, and not selling unless the consent of a majority of my said children then living shall be obtained in writing to the said sales," and that the proceeds of sale should be distributed among the four children, giving the share of any child who should have died, to its lawful issue.

If the wife should not die until after all the children came of age, then, immediately upon her decease, the executor was to enter and sell "in the same way and under the same limitations, and shall distribute the proceeds thereof in the same manner as is above provided, in the case of my wife's dying before all my children shall have come of age."

The children all attained full age and all died before the widow; one of the children had made a conveyance of his interest, for a valuable consideration; one other child left issue, a daughter, who was the sole surviving grandchild and heir of the testator. The executor entered and sold the estates without prejudice to the rights of the several claimants, and the question was whether the sale was authorized by the will, all the children being dead and therefore incapable of consenting.

Held, that the executor took a power coupled with a trust, and could execute the power after the death of the children; and, therefore, the grantee of the child who undertook to convey his interest, had no equity to claim any part of the proceeds.

A. A. Ranney & N. Morse, for plaintiffs.

E. R. Hoar & H. Gray, Jr., for defendants.

GREENWOOD *v.* LAKE SHORE RAILROAD CO.

Appearance and affidavit of merits does not admit corporate existence.

The entry of a general appearance to an action operates as a waiver of a want of proper service, but can have no effect upon the question of the existence of defendants as

a corporate body. Nor does the filing an affidavit of merits prevent the defendants from setting up in their answer as a substantive ground of defence, that they are not a corporate body or liable to be sued as such.

H. F. Durant, for plaintiff.

J. H. Bradley, for defendant.

Brigham *v.* Coburn.

Assignee in insolvency — How to describe himself — Secondary evidence — Appeal on demurrer.

Plaintiffs described themselves as "assignees of S G B, an insolvent debtor." *Held* sufficient, without adding "under the insolvent law of 1833, and the statutes in amendment thereto."

In accuracy the plaintiffs should have described themselves as assignees, not of B, but of his estate. Whether this would have been a demurrable defect if pointed out, *quaere.*

The affidavit of one of two assignees and plaintiffs, to the fact of the loss of, and search for the deed of assignment, is sufficient to authorize the admission of secondary evidence thereof.

It seems that after a demurrer to a declaration has been overruled in the Superior Court, the appeal should be taken immediately, and not after a trial on the merits and verdict for the plaintiff. Whether in the latter case a demurrer can be sustained, *quaere.* Per Metcalf, J.

W. Brigham, for plaintiffs.

J. G. King, for defendant.

Barker *v.* Parker.

Promissory note — Maker and indorser — Holder for value.

A note was given to an insurance company, who indorsed it to a third party, as collateral. After it was returned to the company, the plaintiff, at the company's instance, became second indorser for the purpose of enabling the company to obtain its discount at a bank. *Held*, that these facts cannot affect the right of the plaintiff, after being duly called upon, and required to pay the note to the bank,

as indorser, to recur to all the previous parties to the note, including the maker.

The plaintiff, by taking such note from the bank after it was due, took it subject only to the defences which could have been made against the bank, and might, therefore, if necessary, declare as indorsee, alleging title in the note as succeeding to the rights of the bank.

Claims of the defendant against the insurance company cannot therefore be set off in this action.

F. A. Brooks, for plaintiff.

C. T. & T. H. Russell, for defendant.

EMERSON *v.* WHITE.

Commencement of action — Writ sent for service — Tender.

After a writ is actually made and sent to the sheriff for service, a tender of the amount of the debt without costs, is not a legal tender, although there had not been an actual delivery of such writ to the sheriff.

E. Wright, for plaintiff.

W. Brigham, for defendant.

NEW ENGLAND STEAM AND GAS PIPE CO. *v.* PARKER.

Discharge in insolvency of principal in bond to dissolve attachment, has no effect on sureties. *St.* 1838, *c.* 163, § 7.

The fact that the principal in a bond given to dissolve an attachment goes into insolvency within thirty days after judgment, and afterwards obtains his discharge, by the express provisions of St. 1838, c. 163, § 7, has no effect upon the obligation of the sureties. Their liability is fixed by the judgment and non-payment within the thirty days.

B. Dean, for plaintiff.

Dana & Cobb, for defendant.

WILLS *v.* PRITCHARD.

Second insolvency — Assent of three-fourths of creditors to be within six months. *St.* 1844, *c.* 178, § 5.

The assent in writing of three-fourths of the creditors which, under St. 1844, c. 178, § 5, is essential to the valid-

ity of a second discharge, must be given within six months from the date of the assignment.

H. C. Hutchins, for plaintiff.

C. Robinson, for defendant.

MIZNER *v.* MUNROE.

Notice to tenant at will of act determining the tenancy — Authority of attorney.

The notice given to a tenant at will whose estate has been determined by a lease for years, need not state that such lease is in writing. Notice of the lease, together with a request to leave in five days, is sufficient.

The authority of the attorney signing such notices need not appear thereon.

M. Dyer, Jr., for plaintiff.

A. A. Ranney & N. Morse, for defendant.

FOGG *v.* PEW.

Evidence of fraud by corporation — Acts before incorporation — False representations to the public.

Evidence of conversations between persons who afterwards became officers and stockholders of a corporation, held before the charter of said corporation was obtained, can have no legal tendency to prove a fraud on the part of the corporation, and is inadmissible for such purpose.

In order to show fraud of an insurance company, as a defence to an action brought by their assignees on a premium note, it is not sufficient to show acts and representations done or made publicly or to a third person, though done or made for the purpose of defrauding and deceiving all who might deal with the company.

The facts that the capital stock of said company had not been paid in, and the officers of the company falsely held out to the world that it was paid in, for the purpose of inducing the public to insure with them, and that the defendant was thereby induced to make the contract in question, are no defence to such action.

W. R. P. Washburn & G. W. Smalley, for plaintiff.

R. H. Dana, Jr., for defendant.

HAMMOND *v.* AMERICAN MUTUAL LIFE INS. CO.

Payment falling due on Sunday — Life insurance.

Where a policy of life insurance was conditioned for the payment of the premiums quarterly in advance, on or before noon of the day when the same shall become due, and such day fell on Sunday, in the afternoon of which day the assured died, and the money was tendered on Monday, it was held that the policy was in force at the time of the death.

L. Mason, for plaintiff.

H. A. Scudder, for defendant.

NEWHALL *v.* HOLTON.

Usury on note — When indorser may prove.

A note made for the accommodation of the second indorser, and by him first put into circulation is considered as first issued on the contract between such indorser and the party receiving it from him.

Usury in such contract may be set up as a defence to the note.

The indorser of a promissory note may be a competent witness to an usurious contract made directly with the party to whom the note was first passed, in an action in which such party, or one subject to the same defences, is the plaintiff.

A. H. Fiske, for plaintiff.

A. A. Ranney, for defendant.

ADAMS *v.* BARRY.

Obstruction to right of way — Special damages.

In an action of tort for obstructing a right of way, damages caused by a diminution of rents of the estate, are special, and cannot be recovered under the general allegation. (*See Baldwin v. Western Railroad*, 4 *Gray*, 333.)

J. B. Robb, for plaintiff.

W. Brigham, for defendant.

Circuit Court of the United States. Southern District of New York.

UNITED STATES, COMPLAINANT, *v.* COLLINS AND AL.

The Circuit Court will not grant an injunction to restrain the sale on execution from a State court, of vessels on which the United States claim to have a lien for advances. The possibility that the purchaser may endanger the claim by taking the vessels out of the jurisdiction of the United States is no ground for postponing the claims of the execution creditors.

The Act of March 2, 1793, prohibits the courts of the United States from staying "proceedings" in a State court. It would seem that this would include a sale on execution. Per HALL, J.

This was a motion for a preliminary injunction against William Brown and others, creditors of the "New York and Liverpool United States Mail Steamship Company," who obtained judgments upon their demands against the Company in the courts of the State of New York, and issued executions thereon to the sheriff of the city and county of New York, to restrain and prevent the sale, under executions issued by the State courts, of the mail steamers Atlantic and Baltic, upon which it was claimed the United States have liens, under certain deeds of trust or chattel mortgages, for moneys advanced towards the building and completing of such steamships.

The opinion of the Court, which we are obliged to greatly condense, and to omit many of the points decided, was delivered by

HALL, J.— It is not alleged that the judgments upon which these executions were issued were fraudulently or irregularly obtained, or that there is any reason to doubt that the demands upon which they were rendered were legally and justly due to the plaintiffs in such executions. Indeed, no collusion whatever is alleged, and neither fraud nor bad faith is imputed to either of the defendants. The claim of the United States is based solely on the allegation that they have a lien for advances upon the steamships named, and the equitable ground upon which the motion for an injunction is based may be very briefly stated in the very language of the bill. That language is as follows: —

"And the plaintiffs further show that they have reason to believe, and do believe and apprehend, that if the said steamships are sold, any purchaser or purchasers of the said steamships will have the power to remove, and may remove the same, out of the jurisdiction of this court and of the United States, and in that case the plaintiffs would be wholly remediless."

The defendants, by their affidavits and by other papers read in opposition to the motion, strike at once at the foundation of the complainant's rights, and insist that there is no longer any legal or equitable lien upon the Atlantic and Baltic, under the deeds of trust or chattel mortgages, because the lien for such advances has been, or

should be, fully cancelled by the Secretary of the Navy, who has, as they allege, withheld from the owners of such steamships an amount due to them for mail service rendered to the government, much larger than that now claimed by the United States, and they produce a copy of an opinion of Mr. Attorney-General Black, dated June 4, 1857, and given at the request of the Secretary of the Navy, in which, after an elaborate examination, he concludes that, upon the case presented to him, (and which certainly was not a stronger one against the government than that presented upon this motion,) the amount now claimed by the Steamship Company was improperly and without authority withheld. * * * * * [After expressing his assent to the conclusions of the Attorney-General, the Judge proceeds to state the reasons of his opinion, as follows: —]

It is unnecessary to state in detail the terms of the original contract for the building of the steamships which have been known as the steamships of the Collins Line, or even to give at length the deeds of trust, or chattel mortgages, under which the United States now claim.

These deeds of trust are severally intended as security for the advances made under them, in pursuance of an act of Congress authorizing such advances to be made, and requiring the repayment thereof, to be secured by a loan on such ships, in such manner as the Secretary of the Navy should require; they have been regarded as mortgages, as they are in substance, and it is alleged in the bill that they have been duly and annually filed in the office of the register of the city and county of New York as required by the laws of New York, to make them valid and continuing liens, as chattel mortgages, against judgment creditors and subsequent encumbrances.

By the first of these deeds of trust the then owners of the steamships Pacific (since totally lost at sea) and Atlantic, did "bargain, sell and convey" the said steamships, with all their tackle, apparel and furniture, to the trustee therein named, "upon trust, nevertheless, that the said owners were to retain the possession of such steamships, and employ them in carrying the mails, &c.; and if, after the expiration of one year from the commencement of their employment in the mail service, under the existing contract with the United States, being required thereto in writing by the Secretary of the Navy, they should fail to repay in money or to refund out of their compensation for mail service for one year, or out of the value of said vessels, if before the expiration of one year they should be taken into the service of the United States, such outstanding balances as might be due on account of such advances, and the interest thereon, then the said trustee being required so to do by the Secretary of the Navy of the United States, should, after advertising for six months in two newspapers published in the city of New York, the time and place of such sale, proceed to sell at public auction, for cash, the said steamships, &c., and out of the proceeds of said sale pay, first, the expenses of executing such trust, and secondly, such unsatisfied balances of advances," &c.

* * * * * * *

The United States claim that there is a balance of $115,500 due for advances made under these deeds of trust; and the defendants insist that there is a larger amount due to them for mail services in the year ending on the 31st of March, 1857, which they are entitled to set-off, and which the government is legally and equitably bound to set-off, against the balance now claimed, so far as such set-off may be necessary in order to extinguish their alleged indebtedness to the government.

The government, on the other hand, insists that the Secretary of the Navy has fully paid for the mail service rendered, and that nothing is now due therefor.

(This question which involved the right of government to make any reduction in the contract price, on account of the substitution of the Ericsson in place of the lost Pacific, his Honor decided in favor of the defendants, and continued: —)

I am, therefore, entirely satisfied that the defendants have a right to insist that there is a larger sum due for mail service than that yet remaining unpaid on account of the advances secured by the trust deeds; and also to insist in this court that one claim shall be set off against the other.

But if I could reach the conclusion that there would still be a balance due to the government, upon the equitable adjustment of their accounts with the Collins line, I should be unable to find any solid ground on which to rest a decision in favor of the complainants upon the present motion. The execution creditors have a present right to sell the Atlantic and the Baltic, subject to the lien (if any) which the government has thereon; and if that lien is good and valid as against these execution creditors, a sale under such executions must necessarily be subject to such lien. The execution creditors have a present right to sell under their executions; such is the remedy given them by law; the United States have at best but a right to sell after a notice of six months, according to the express terms of their contract. Both are strict legal rights. Certainly the rights, and even the equities, of the execution creditors would even then be superior to those of the United States, so far, at least, as to allow them to sell these steamships, subject to the liens of the United States. That they may be sold to some unknown person, that such person may possibly take them beyond the jurisdiction of the United States, and the existence of a vague fear that the claim of the United States may be endangered thereby — is no sufficient ground for postponing the claims of the execution creditors until the expiration of the six months required to perfect a sale under the deeds of trust or mortgages before mentioned. This court cannot order a present sale of the steamers under the deeds of trust, and the right of the United States to provide by these instruments for a more summary proceeding to enforce the rights and for taking possession of the property upon a failure to repay the advances according to the terms of the contract, furnishes no equitable ground for relief against the execution creditors, whose

rights, such as they are, are absolute, and may be legally and equitably carried into immediate execution.

I am, therefore, entirely clear that the United States have shown no equities superior to those of the execution creditors, and that they are not entitled to the injunction prayed for.

It must not be supposed that in thus expressing a decided and confident opinion against this motion, I intend to intimate that it was improper to present this case for the consideration of this court. The questions presented are judicial in their character, and properly belong to the courts of the United States and the head of an Executive Department; and the District Attorney may therefore well decline, in a case of the magnitude and importance of that presented by the bill in this case, to take the responsibility of deciding, as administrative officers, against a claim of the United States, which can be readily made the subject of judicial investigation.

It may be proper also to state that if I had reached a different conclusion in regard to the equities of the parties, I should have felt bound to ask an argument upon, and to have seriously considered a question not raised at bar, before ordering an injunction in this case.

The 5th section of the Act of 2d March, 1793, prohibits the courts of the United States from granting an injunction "to stay *proceedings* in any court of a State;" and this term "proceedings" may properly, and, I think, must necessarily, include all steps taken by the court, or by its officers under its process, from the institution of the suit until the close of the final process of execution which may issue therein. (2 Curtis, C. C. Reports, 465, 468 and 469.) But as this question has not been argued, I do not rest my decision upon this ground.

The motion for a preliminary injunction is denied.

District Court of the United States. Southern District of New York.

BENJAMIN *v.* THE WATCHMAN.

Salvage—Purchase by salvor.

A party who has purchased the vessel while she was a wreck can in no case be regarded as a salvor in the sense of the maritime law. Otherwise the court would be called upon to decree to him a share of the property saved as compensation, and then decree the surplus to him as owner. A libel brought in such case can only be to obtain, by the intervention of the court, a confirmation of the sale to him and of his title, and there is no authority in law for such a proceeding.

KISSAM *v.* THE ALBERT.

Collision.

When the connection of a vessel with a collision is wholly passive, and she has in no way, by her voluntary action, contributed to it, no decided case or recognized principle of the sea laws is known which subjects her to responsibility for its consequences. As where the collision is caused by the swell raised by a passing steamer, and no fault or negligence of the libelled vessel is shown to have contributed to the damage.

UNITED STATES *v.* THE EXPRESS.

SAME *v.* 240 BUNDLES OF CIGARS.

Discharge of cargo into lighters not an unloading under the statute. After such discharge, by general order, consignee should be allowed to make a post entry of goods not on the manifest.

Proceedings to forfeit vessels and cigars on the ground that the cigars, exceeding $400 in value, were unloaded from the vessel without any permit from the Collector, contrary to the 50th section of the Collection Act of March 2, 1857. The facts were, that when the vessel arrived she was detained at quarantine, and her cargo was ordered to be discharged into lighters — some cigars under special permit, and the rest of the cargo under a general order. All the cargo of the vessel was thus discharged from the Express into lighters, under the inspection of custom house officers, and brought to this city; but before it was landed, the consignees, discovering that the cigars in question were not upon the manifest, applied to the collector to make a post entry of them.

Held, that upon the facts in evidence the act of removing the cargo into lighters was not an unloading and delivery of them from the barque, coming reasonably within the purview of the prohibition of the statute, (1 Stat. at Large 665, § 50,) the separation from the vessel not taking them from her charge and control (2 Wash., C. C. R., p. 310.) That what was done in respect to these cigars, fairly falls within the scope of the authorization of the general order issued to the consignee. The informations dismissed, and vessel and cigars ordered to be discharged.

ABBEY *v.* THE R. L. STEVENS.

A steam tug is not a common carrier with regard to the vessels she transports, and is only liable for negligence.

Supreme Court of New York, February, 1858. *Before Davis, Clarke and Sutherland, J. J.*

[Condensed from the Daily Law Gazette.]

RODGERS *v.* THE PEOPLE.

Although intoxication is never an excuse for crime, yet where the question of guilt or innocence, or the degree of the crime is one of *intent*, it may be a material circumstance and one which, on the question of intent, the prisoner is entitled to have fairly submitted to the jury.

The plaintiff in error was indicted for murder, under which indictment he could have been convicted either of murder or manslaughter. The homicide was committed in the street; there was no evidence of premeditation, and there was evidence of the prisoner's intoxication at the time.

The counsel for the prisoner requested the court to charge: "That if it appeared by the evidence, that the condition of the prisoner, from intoxication, was such as to show that there was no intention or motive to commit the crime of murder, that the jury should find a verdict of manslaughter." The court refused to charge as requested, but charged: "That under the old law, intoxication was an aggravation of crime, but that intoxication never excused crime unless it was of the degree to deprive the offender of his reasoning faculties. The opinion of the court, which we are obliged to condense, and to omit the review of the evidence, was delivered by

SUTHERLAND, J. If the prisoner did intend to kill the deceased when he struck the fatal blow, he was guilty of murder, though his intention or design to kill preceded the blow but an instant. (The *People v. Clark*, 3 Selden, 385. The *People v. Sullivan*, 3 do. 396, 2 R. S. 657, § 5.)

If the prisoner struck the fatal blow in the heat of passion, without the intention or design to kill, he was guilty of one of the degrees of manslaughter only. (2 R. S. 661, §§ 10 and 12.)

The whole question was one of intent, to be inferred by the Jury from the material circumstances of the case; and every circumstance in the case was material, which the jury was authorized to take into consideration on the question of intent.

Was the intoxication of the prisoner on that occasion a circumstance which the jury were authorized to consider in determining whether the fatal blow was struck with the intention to kill?

We think it was.

The violent homicide for which the prisoner was tried had different degrees, depending on the intent to kill, or the absence of such intent. The statutory definition of two of the degrees of manslaughter implies not only that a homicide committed in the heat of passion may have been committed without the intention to kill, but that also such heat of passion is likely to prevent the reasoning, calculation, reflection or design, implied by a particular intent.

Can any one say that intoxicating drinks taken into the body do not tend to intoxicate the mind, and to inflame the passions? that they do not tend to make anger and other revengeful passions more excitable? Can any one say that intoxication does not tend to produce a confusion of mind of material consideration on the question of a specific intent, where, from all the other circumstances in the case, it is evident the intent originated on the spot, but an instant before the blow, or cotemporaneously with the will to strike the blow?

All human experience proves the contrary.

No doubt great caution is necessary in the application of this doctrine.

We do not say *that it should be applied in any case where there is evidence of premeditation aliunde the circumstances of the affray, or occasion on which the homicide was committed;* for we know that it is not unusual for criminals to fortify themselves for crime with liquor. But in homicides of different degrees according to the intent, and in larcenies, forgeries, and other crimes depending on intent or knowledge, in many cases the intoxication of the prisoner is a material circumstance for the jury. Surely, it would not be legal or right to convict a man of passing a counterfeit bill, knowing it to be counterfeit, when he was so intoxicated as not to know a counterfeit bill from a genuine one, without proof to show that previous to his intoxication he knew it was counterfeit.

In this case, we think the court below erred in withdrawing the attention of the jury from the circumstance of intoxication in the manner the case shows.

The counsel for the prisoner substantially requested the court to charge the jury, that they had a right to take the intoxication of the prisoner into consideration with the other circumstances of the case in determining the intent, and that if they found that there was no intention to commit the crime of murder, the jury should find a verdict of manslaughter.

The court by refusing to so charge, and thereupon charging that intoxication was an aggravation of crime,—that it "never excused crime unless it was of a degree to deprive the offender of his faculties," not only erred in refusing to submit the circumstance of intoxication to the jury, for their consideration as to whether they should find the prisoner guilty of murder or manslaughter, but may have led the jury to suppose that his intoxication was absolutely to be weighed against him in settling their verdict as between murder and manslaughter. And, certainly, had the prisoner been on trial for manslaughter only, his intoxication would have tended to make out, and perhaps to aggravate the crime; because it would have tended to show that the prisoner did the act in the heat of passion.

The error of the court below does not consist in charging the law wrong as far as the court positively charged; but in giving to the jury good law on a point where it was applicable, as a reason for re-

fusing to charge other good law as requested, as to the point of intention where *it* was applicable.

It is true; and the law in England and in this country is, that if a man voluntarily makes himself drunk, it is no excuse for any crime he may commit while he is so. (1 Hale 7, 4 Black. Com. 26. *People* vs. *Pine*, 2 *Barb.* 566.)

But it does not follow because drunkenness is no excuse for crime, that it is not, in some cases, where the question of guilt or innocence is one of intent, or where the degree of the crime on the same facts depends on the specific intent, a material circumstance in determining *whether any crime had been committed, or the degree of the crime which had been committed.*

We think that, in this case, the right of the prisoner to have the circumstance of his intoxication fairly submitted to the jury on the question of intent; or whether he was guilty of manslaughter or murder; as clear and as well established by law, as the principle that voluntary drunkenness is no excuse for crime.

The principles are consistent with each other. See Am. Crim. Law, §§ 41–44, and cases there cited.

We think, for the reasons above stated, he may have been prejudiced from not having had the circumstance of his intoxication submitted to the jury with the other circumstances of the case, especially considering the positive charge of the Court, and that he is therefore entitled to a new trial.

Broderick & al. v. Smith.

Case in which mortgagor will be protected in equity against oppressive attempt to foreclose.

Action to foreclose under the following circumstances. Plaintiffs agreed to convey land to defendant, but when the time arrived, were unable to give a clear title on account of a judgment lien. Defendant waived his right to rescind the agreement, at plaintiffs' solicitation, and accepted a conveyance, together with an agreement to discharge said lien within a certain time, or to deposit the amount of the judgment in defendant's hands. Defendant then executed the mortgage in question for part of the purchase money, payable in four years, and containing a clause that in case the interest, or any part thereof, should not be paid on the day when the same was payable, and should remain unpaid and in arrear for the space of twenty days, then the principal sum of four thousand dollars, with all arrears of interest thereon, should, at the option of said plaintiffs, become due and payable immediately thereafter, although the period first above mentioned for the payment of the principal sum might not have expired.

The first instalment of interest fell due before the expiration of the time fixed for the discharge of the lien. Two days afterwards the plaintiffs discharged the lien, but gave no notice of the fact to de-

fendant, and made no demand for the interest. The twenty days expired without payment on the 16th of January.

On the 22d of January, the plaintiffs' attorneys notified the defendant, that the bond and mortgage had been placed in their hands for collection, and that the same had by the terms thereof become due and payable.

This suit was commenced on the fourth day of February, to foreclose the mortgage, the plaintiffs claiming that the principal as well as interest was due and payable.

On the 25th of January, the defendant offered to the plaintiffs' attorneys the half year's interest, which fell due on the 27th of December, with interest on the interest, and to stipulate in writing, to pay the costs of the plaintiffs in this action, on their being adjusted. This offer was declined.

The opinion of the Court, which we are obliged to condense, was delivered by

CLERKE, J.—It will be seen that the defendant allowed the twenty days for payment of interest to elapse, under the impression that the plaintiffs had not procured the judgment, which was a lien on the premises to be cancelled. When the interest became due, on the 27th of December, 1855, the judgment remained uncancelled; after it was cancelled, no notice of it was given to the defendant; and no demand of interest was made, or the slightest intimation given, that payment of it would be required, according to the strict terms of the bond. Usually, when no stratagem is intended, the obligee calls or sends for this interest. But, the plaintiffs allowed the twenty days to elapse without uttering a hint; when they supposed that the default would be irrevocable, and that they would be entitled to exact prompt payment of the whole principal and interest; and in failure of this to foreclose the defendant's equity of redemption.

Nothing was more natural, under these circumstances, than for the defendant to suppose that the plaintiffs would not require the payment of the interest ($140) until the lien on his property (for $\$518\frac{18}{100}$) should be cancelled; and, I think it was contrary to all equitable dealing for the plaintiffs to take advantage of these circumstances, instead of apprising the defendants of the cancellation, and, in due time, before the expiration of the twenty days, claiming the payment of the interest. This was oppressive and unreasonable conduct.

If there is any one action more than another preëminently the subject of jealous supervision by courts of equity, it is the action now under consideration. All transactions between mortgagor and mortgagee have been always closely scrutinized by them, and when the latter has taken advantage in any way of the former, or where there has been any detriment or hardship resulting from the inequality of their relative positions, and when there has been a mistake, injurious to the former, of which the latter ought in conscience to have apprised him, a court of equity, so far from lending its assistance to consummate the wrong, will interpose to repair it. This is not an ar-

bitrary interference with the substantial and essential provisions of a contract; it is shielding innocent or unfortunate persons againt the unscrupulous perversion of them; it is interposing to prevent the employment of legal forms for purposes which legal forms were never designed to promote. The action to foreclose an equity of redemption, and, indeed permitting an equity of redemption to exist by courts of equity, is a proof of this.

If the court has power to interpose, so as to change the whole character and effect of the instrument, it assuredly has power to mollify the effect of a single clause of it, relating to the period limited for the payment of interest. All that the mortgagee in either case ought to require is, that he should be secured against injury, and that he should derive all the benefit that natural justice demands.

The judgment of the special term, dismissing the complaint was affirmed. Sutherland, J. dissented.

A. C. Bradley, for plaintiff.

Robert Emmet, for defendant.

Ruse *v.* The Mutual Ins. Co.

An Insurance Company may be estopped by the terms of their prospectus from enforcing the forfeiture of a policy.

The words of the policy were, that the defendants, "in consideration of the sum of ninety-seven dollars and forty cents to them in hand paid, by John C. Ruse, and of the annual premium of ninety-seven dollars and forty cents to be paid on or before the 10th day of April, in every year during the continuance of this policy, do assure the life of Ira D. Bugbee, of Apalachicola, in the county of Franklin, State of Florida, in the amount of two thousand dollars, for the term of life, for the sole use of said John C. Ruse."

In a subsequent part of the policy, it was agreed and provided, that "in case the said John C. Ruse shall not pay the said annual premium on or before the several days herein before mentioned for the payment thereof, then and in every such case, the said Company shall not be liable to the payment of the sum or any part thereof; and this policy shall cease and determine."

When the plaintiff made his application for the insurance, in April, 1846, the defendants' agent handed to him a pamphlet issued by the defendants, entitled "Prospectus," &c., which contained these clauses:

"20th. Every precaution is taken to prevent a forfeiture of policy."

"A party neglecting to settle his annual premium within thirty days after it is due, &c., forfeits the interest he has in the policy."

The premium for the second year was not paid on the 10th day of April, 1848. Bugbee died on the 14th day of April, 1847, and due notice of his death was given to the defendants.

Held, 1. That the policy was one entire contract of insurance, not from year to year, as the premium should be paid, but for the whole term of the life of Bugbee, on *condition*, that if the annual premium was not paid on the 10th of April, the policy should cease and be void.

2. Admitting, according to the terms of the policy itself, such default in the payment of the premium to be a good defence to the plaintiff's claim; yet that the defendants were estopped by their own act and declaration — their "Prospectus"— from setting up and insisting upon such default, as against the plaintiff's claim.

3. That the plaintiff's application in writing for the insurance, which was accepted by the defendants, and in which the plaintiff stated that he had an interest in the life of Bugbee to the full amount of the sum of $2000, was sufficient proof of such interest as between the parties, if any proof of interest was necessary.

New York Common Pleas. General Term, December, 1855, before Ingraham, Woodruff and Daly, JJ.

WORTH *v.* MUMFORD AND OTHERS.

Seamen's Wages—Mariners' Lien.

The plaintiff shipped as a mariner, on board the ship Palestine, for a voyage from San Francisco to one or more ports in Peru, at a stipulated rate of wages, and from thence to a port of discharge in the United States, at the "going rate of wages." The ship encountered heavy gales in the Atlantic, during which she sprung a leak, but was brought safely into the harbor of Pernambuco, though in so disabled a state that the cargo had to be discharged. The ship was also condemned and sold for the benefit of all concerned. The cargo, consisting of guano from the Chincha Islands, was shipped by another vessel to Baltimore, the port of destination, at a cost of $13\frac{88}{100}$ per ton, that being the lowest rate at which its transportation could be obtained from Pernambuco to Baltimore, and which was $1\frac{88}{100}$ more per ton than the rate at which the owners had agreed to carry it from the Chincha Islands to Baltimore, that is, it cost the owners more to complete the contract, than they were to receive from the freighter at the Chincha Islands.

Held, That as the freight contracted for in the beginning of the voyage was actually earned, though to earn it, the owners were put to a greater expense than the whole of it amounted to, the plaintiff is entitled to recover from the owner his wages up to the time of the arrival of the ship in the port of Pernambuco. See 7 Term Rep. 381; 1 Wm.

Black., 190; 2 H. Black., 606; 12 Johns, 324; 14 Jurist, 1007; 1 Eng. Eq. Rep. 665; 9 Johns, 350.

Held further, in reference to the maxim that freight is the mother of wages. That in certain cases, as where the vessel is totally lost, but freight has been previously earned in the course of the voyage, or where part of the cargo is saved, upon which freight has been or may be earned, the seaman, by virtue of his maritime lien, has a right to his wages *out of* the freight, and thus it may be said, in such cases, that freight is the mother of wages. A fund is created by the earning of freight, which is pledged to the seaman for the payment of his wages. His right to them, in such cases, grows out of the earning of the freight. But as a general rule, wages do not depend upon the earning of freight, nor is it true, as a general maxim, that freight is the mother of wages. Furthermore, the dictum that the safety of the ship is the mother of freight, is equally without foundation.

Opinion by DALY, J.

As this is a case of unusual importance, and as it has not yet been published, the profession will doubtless see the propriety of presenting the above abstract, though so long after the decision was rendered. The opinion by Judge Daly contains a most elaborate and scrutinizing analysis of the authorities on this subject, from the laws of Oleron, down to our own time. He argues that there is no longer any reason for the policy that makes the right to wages dependent upon the safety of the ship; that this policy originated with those piratical adventurers who infested the seas of Northern Europe in the middle ages, with whom the duties and relations of seamen were materially different from what they are at present, that the crew of a ship are not now as then, joint adventurers with a master of their own choice, but hired laborers, or servants, and nothing more; that they do not even have any power of direction and control, like common carriers and inn keepers, and therefore, *a fortiori*, the exception in their case to the principles which govern in ordinary contracts of hire and service, is unreasonable and unjust:—furthermore, that the reason assigned for the rule under consideration, viz: that were it otherwise, the seamen would not use their best endeavors for the safety of the vessel and cargo, is founded upon a distrust of this class of persons, which makes them an exception to every other class of laborers; that it leaves out of view the natural desire of all men for the preservation of their lives, and that its necessity, as a stimulant to duty, is sufficiently disproved by the maritime character of the seamen of the many intelligent commercial nations, both ancient and modern, among whom no such rule has ever prevailed.

His Honor contends, that the cases on this subject, reported in Siderfin, Keble, 2 Show, 1 Lord Raymond, 3 Salkeld, and in the Modern Reports, are of very questionable, and some of them of no authority whatever. He reviews with great care and ability the American cases, and especially the case of *Dunnett* v. *Tomhagen*, 3 Johns, 154. He also discusses at length the subject of salvage, and calls in question the soundness of the doctrine, that a seaman, while he remains such, *de facto*, can assume or act in the capacity of a salvor.

This opinion, we are informed, will be published at length in the fourth volume of E. D. Smith's Reports.

CASES IN MAINE.

Penobscot County.

FISHER *v.* SHAW.

Waiver of foreclosure — Specific performance — Liquidated damages.

An effectual waiver of a right to hold a mortgage foreclosed must be by the mortgagee, or some one having an interest under him.

If such supposed waiver is made before the interest in a mortgage is acquired by the person who makes the waiver, the time of redemption is not thereby extended.

If the contract in a bond appears only in the condition, secured by a penalty, the court will not, in equity, permit the parties to escape from a specific performance by offering to pay the penalty.

But when there is a written contract, by which the party is to do a certain act, or pay a specified amount as liquidated damages, it is not a case within the equity powers of this court, there being an adequate remedy at law.

BANGOR *v.* HAMPDEN.

Paupers.

This was an action to recover the amount of supplies by the plaintiff town to a man, his wife and children, as paupers; the former having no settlement in this State, and the wife and children having their settlement in the defendant town.

Held, that the town of Hampden was liable for necessaries furnished the wife and children, but not those furnished the husband.

LUMBERMAN'S BANK *v.* BEARCE.

Usury.

A bank is liable to no different or higher penalties than individuals, for taking usurious interest.

The word "person," as used in the Revised Statutes, applies to banks as well as individuals.

To prove usury, the defendant must take the oath *himself*, as required in the R. S., ch. 69, if he would avail himself of his rights under the statute. And this, though he may have been only an endorser and not a party to the usurious transaction.

STATE *v.* WILSON.

Ferries — Public ways — Dedication.

Passengers by a ferry, when the tide is out, and the space between low and high water is bare, may pass over the shore, without being liable to a riparian proprietor, and without hindrance.

The limits of a ferry are high water mark on each side of the river.

The public have not the right to use land adjoining navigable waters, as a place of common deposit of goods in transit, against the will of the owner, although for more than twenty years such user has been continued.

Somerset.

MAYHEW *v.* PAINE *and Tr.*

Wife's earnings — Trustee process.

The wife of A tendered to B a sum of money, her own earnings, to redeem real estate held by the latter as mortgagee, to secure the payment of certain notes of A. The money not having been taken by B, was deposited by her with C, subject to the order of B, or her own order, in which condition it remained at the time of the service of the writ on C as trustee of A. *Held*, that C was not chargeable as trustee of A.

GRAY *v.* KIMBALL.

Seizure and destruction of property used for unlawful purposes.

Certain property when used for unlawful purposes, may be forfeited and destroyed, by operation of law. And when such property is attempted to be so used, and ordinary diligence fails to make such discovery as to enable the law to declare their forfeiture, statutes authorizing search and seizure are legitimate.

The owner cannot be deprived of his property so used without an accusation against him; setting out the charge and its nature, and by the judgment of his peers or the law of the land.

The citizen, by the Constitution, is to be secure in his person, papers and possessions, from unreasonable seizure and search.

The Act of 1853, ch. 48, for the "suppression of drinking houses," &c., does not violate these constitutional rights of the citizen.

The officer who executes a process issued by a court or magistrate having jurisdiction, and right upon its face, is thereby protected.

Laws authorizing proceedings *in rem*, may be enforced, when the owner of the property seized may not, in point of fact, be informed thereof.

Hancock.

DOANE *v.* HADLOCK.

Wills — Interlineations after execution.

To give effect to a will, it must conform to the statute.

An interlineation in a will by the testator, without a new attestation, after its execution, will not render void the entire will, but only the part interlined.

So if the interlineation be the work of a stranger.

TAGGART *v.* BUCKMORE.

Of statute liens.

The lien provided by ch. 125, sec. 35, Revised Statutes, is a particular lien, and attaches only on account of labor employed, or expenses bestowed upon the identical property so held.

Materials furnished under the representation that they were to be used in the construction of a vessel, but were not so used, would not create a lien on the vessel.

But if they were incorporated into another vessel than the one for which they were designated, the lien would attach to such vessel.

B purchased a quantity of iron of A, a portion only of which was wrought into a vessel. The other part remained unused. A afterwards obtained judgment for the amount of the whole. *Held*, that this was a waiver of the lien upon the vessel, as the value of the iron not used was merged in the judgment and could not be separated from the other part.

Cumberland.

STATE *v.* PHINNEY.

Indictment — Variance — Re-arrest after escape — Right to demand authority.

An indictment contained four counts. The first two alleged, in different forms, an assault with intent to *murder*; the last two, an assault with intent to *kill*. *Held*, that but one substantive offence is charged in all the counts, and that the accused may be found guilty of assault simply, or with intent either to kill or murder.

The accused is entitled to have the jury pass upon each substantive charge in an indictment.

When the jury find the accused guilty upon one count, and are silent as to the rest, it is an acquittal as to the others.

An officer is bound to show his authority for making an arrest, when it is demanded. If he omits to do so, he is deprived of the

protection which the law throws around him in the discharge of his duty.

But if an arrested person escapes, without questioning the authority of the officer, he is not entitled to the same extent, upon a re-arrest, to demand such authority.

Kennebec.

Heywood *v.* Heyward.

Contract.

A agreed to pay B, as rent for a farm, forty dollars per annum; the payment to be in specific articles, at agreed prices and quantities, with the balance in cash or country produce at cash price. *Held*, that if, when due, A tenders the articles, B must receive them, not at the cash but at the agreed price. *Held*, also, that upon the failure of A to tender them, B must take the forty dollars, as the agreed measure of damages.

No word in a contract is to be treated as a redundancy, if any consistent and reasonable meaning can be given it.

Haskell *v.* Putnam.

Estoppel — Tax title.

For a valuable consideration, A agreed to convey to B, within two years, certain premises, *provided* B paid a stipulated sum within that time to A, and all the taxes that might be levied on the premises, together with an agreed amount annually, for rent. B fulfilled none of the conditions, but allowed the property to be sold for taxes and purchased the tax title himself. *Held*, that B, not having paid the taxes, according to his agreement, could not set up, as against A, a title obtained by a violation of his contract.

Stinson (*by Pro. Ami*) *v.* City of Gardiner.

Liability of towns for defective highways.

Persons in passing and repassing on a public highway, may use any part of it, provided they do not violate any laws and well settled rules relating to such use.

Safety and convenience for travellers, their horses and teams, is the rule by which to determine whether there be any defect in a highway.

The public have no rights in a highway, except the right of passage over it.

When children use a public highway for their sports, and not for travel, the town is not liable for any injury that may result to them while so engaged, though the injury may be the consequence of a defect in the road.

Hurd *v.* Coleman.

Mortgage — Foreclosure — Costs.

A party, whose legal right to real estate has been decided by a judgment of a court of law, may enter upon effectual possession, as well without as with the intervention of an officer. And this, though no writ of possession has issued.

An assignment of a mortgage after entry for foreclosure, will not of itself stay the foreclosure.

A mortgagor is bound to know of a judgment rendered against him, and of its legal effect, and of the writ of possession, or when, by law, it might issue.

Undisturbed possession by a mortgagee, or his assignee, for twenty years, is a bar to the right of redemption, unless the proviso in the statute of limitations applies to the case.

When a foreclosure is perfected, and the mortgaged premises exceed in value the debt secured, the debt is thereby paid.

A lien of a mortgagee attaches equally for the debt, and the costs necessarily incurred in the enforcement of his rights.

Washington.

Bates *v.* Enright.

Husband's liability for debts of wife.

Involuntary separation of a wife from her husband — and where, in some instances, by operation of law, it exists by her fault — does not discharge the husband from his liability to maintain her.

A wife cannot bind herself by note or contract for the price of such necessaries as her situation requires, even in cases where her conduct has absolved her husband from liability on her account.

A wife gave her note to the county treasurer to relieve herself from imprisonment for non-payment of a fine and costs for the unlawful sale of spirituous liquors, and for her support in prison, which note was indorsed over by the treasurer to a third party. *Held*, that the note is not valid in the hands of the indorsee, either as against her husband or herself.

Superior Court for the County of Suffolk. May Term, 1857.

PRACTICE.

McCann *v.* Russell.

Exceptions to the ruling of the Court should be taken during the progress of the trial, and when the ruling is made.

By the Court.—The question in this case is whether exceptions to the rulings and instructions of the Judge, in his charge to the jury, can be taken for the first time after verdict returned by the jury.

The rule at common law requires the bill of exceptions to be tendered at or in the progress of the trial. The reason assigned is a good and substantial one. Tidd states it thus—that "if the party acquiesce at the trial, he waives it, and shall not resort back to his exception after a verdict against him, when perhaps, if he had stood upon his exception, the other party had more evidence, and need not have put the cause upon that point; and the nature and reason of the thing require that it should be reduced to writing, when taken and disallowed, because it is to become a record."

Archbold, in his "Practice," states the rule in the same way.

In New York such is the well settled practice. Graham, in his "Practice," says the exception must be taken to the ruling at the time it is made, and if it is to the charge to the jury, before the jury have delivered their verdict, and cites 6 Johns. 279; 1 Johns. 312.

In writs of error, founded upon bills of exceptions, in England, the form of making up the record is by the recital that *at the trial* of the issue, counsel alleged exceptions to the opinion of the Court. *Morey* v. *Leach*, 3 Burr, 1692.

The rule is well established in Pennsylvania. 1 Troubet and Haly's Practice, 356; *Morris* v. *Buckley*, 8 Serg. & R. 216. Tilghman, C. J., says, "Any other rule would be attended with excessive inconvenience, and place judges in a condition so perilous that no prudence or diligence could protect them."

In the United States Courts this has long been well-settled law. *Jones* v. *Ins. Co.* N. Amer. 4 Dallas, 246; *Walton* v. *U. States*, 9 Wheat. 657; *Phelps* v. *Mayer*, 15 Howard, 160. In this latter case, Chief Justice Taney says that the statute of Westminster 2d, which provides for proceeding by exception, requires in explicit terms that the exception should be taken while the jury are at the bar, even where

special instructions are asked for, and that the rule *is for purposes of justice, so that the Judge can reconsider or explain more fully to the jury.* See also *Sheppard* v. *Wilson*, 6 Howard, 275.

In *Briggs* v. *Barry*, in the Circuit Court lately held by Judge Curtis, counsel on each side stated their view of the law; and the court, without adopting that of either, or stating what the ruling would be, charged the jury according to his own understanding of the law. After verdict, the ruling party tendered a bill of exceptions, which was declined by the court, on the ground that they were not taken when the charge was given.

The same rule is substantially recognized in several cases in Maine, where the statute touching bills of exception is similar to our own. *Emery* v. *Vinall*, 26 Maine, 295; *Kimball* v. *Irish*, 26 Maine, 444.

We have examined precedents and authorities more fully, because in *Buckland* v. *Charlemont*, 3 Pick. 173, two of three Judges, during the argument of counsel, stated the rule of practice to have been different in this Commonwealth, under our statute, though they admitted that at common law it was as claimed. The matter was not pressed to a decision, however, and subsided on the intimation of the Chief Justice.

The remark of the court in *Sawyer* v. *Merril*, 6 Pick. 480, in regard to motions for a new trial, seems hardly consistent with the ground taken in *Buckland* v. *Charlemont*, for the court here say, "It is expected that all material points will be suggested before the Judge sums up, and that it is at the Judge's discretion to receive a motion for instructions on a point not suggested at the trial.

The provisions of the Revised Statutes, ch. 82, sec. 12, requiring an allowance of exceptions by the presiding Judge, when presented before adjournment without day, relate rather to reducing to writing and presenting them, than to the time or mode of taking, or "alleging" them.

For these reasons we think the exceptions in this case were taken too late.

Notice to Quit.

[The following abstract of Massachusetts law on this subject was prepared by a member of the Suffolk bar for personal reference alone. It seems very complete, and may be of convenience to our Massachusetts readers.]

I. *When necessary.* II. *When not necessary.* III. *Form of.* IV. *Effect of.* V. *Waiver of.*

I. *When necessary.*

1. To terminate tenancies at will. R. S. c. 60, s. 26. *Howard* vs. *Merriam*, 5 Cush. 571. *Whitney* vs. *Gordon*, 1 Cush. 266.

2. To terminate a tenancy under a written or parol lease before the expiration of the term for non-payment of rent. R. S., c. 60, s 26. St. 1847, c. 267, s. 1. St. 1856, c. 85.

II. *When not necessary.*

1. At the expiration of a lease, whether written or parol, for a definite time.

Creech vs. *Crockett*, 5 Cush. 136. *Elliott* vs. *Stone*, 1 Gray 574. *Hollis* vs. *Pool*, 3 Met. 351. *Dorrell* vs. *Johnson*, 17 Pick. 263, 266. *Danforth* vs. *Sergeant*, 14 Mass. 491.

2. When by the terms of the lease, whether it be written or parol, the tenancy is upon condition, or condition precedent, or is to expire upon the happening of some contingent event, and the condition has been broken or the contingency has arisen.*

a. As where a written lease contained a condition that if the lessee should neglect or fail to perform and observe any covenant on his part to be performed, the lessor might enter, &c. *Fifty Associates* vs. *Howland*, 11 Met. 99. S. C. 5 Cush. 214, 218.

b. So where premises were leased by parol with an agreement that, when the tenant failed to pay his rent quarterly in advance, he should leave the premises. *Elliott* vs. *Stone*, 1 Gray 571.

And it seems that in all cases of a parol lease with rent payable in advance, the payment constitutes a condition precedent to the commencement of each term, and no particular agreement to leave is necessary. *Same case, last paragraph.*

c. Or on condition that they should be used as a barbers' shop. *Creech* vs. *Crockett*, 5 Cush. 133.

d. So where it was agreed by parol that the tenancy should cease when the estate should be sold. *Hollis* vs. *Pool*, 3 Met. 350.

e. But not where the tenant had undertaken to take care of certain

* But in this class of cases, although notice to quit be unnecessary, it does not follow that the summary process of c. 104 will lie. That depends on whether the tenancy is determined by the enforcement of a breach of condition on one hand, or by a conditional limitation or failure of condition precedent to its renewal on the other. In the latter cases the lease expires by its own limitation.

young trees in lieu of paying rent, and had neglected the trees. *Gleason* vs. *Gleason*, 8 Cush. 32.

3. In certain cases in which a tenancy at will is determined by act of law and converted into a tenancy at sufferance. Such cases are :

First. When the lessor at will alienes the estate. *Howard* vs. *Merriam*, 5 Cush. 563, 574. *Hollis* vs. *Pool*, 3 Met. 350. *Benedict* vs. *Morse*, 10 Met. 223.

But if the lessor conveys away his estate "colorably or fraudulently, without any intent to alienate, it might, like other fraudulent and colorable acts, be held void." Shaw, C. J., in *Howard* vs. *Merriam*, 5 Cush. 574.

Second. When the lessor at will makes a lease for years. *Furlong* vs. *Leary*, 8 Cush. 409. *Kelly* vs. *Waite*, 12 Met. 300. *Hildreth* vs. *Conant*, 10 Met. 298.

But the tenant at will is entitled to notice of the lease before process is commenced under R. S. c. 104. *Furlong* vs. *Leary*, 5 Cush. 409.

And also it would seem to reasonable time to remove his effects, which does not extend to time to find other premises equally adapted to his trade. *Mann* vs. *Hughes*, 10 Law Reporter 628. The notice of lease need not state that it is a lease in writing. *Mizner* vs. *Munroe*. Ante. p. 35.

Third. Upon the death of either the lessor or the lessee. *Ferrin* vs. *Kenney*, 10 Met. 294. *Ellis* vs. *Paige*, 1 Pick. 47. *Rising* vs. *Stannard*, 17 Mass. 284.

Fourth. Upon partition between tenants in common, one of whom was the lessor. *Rising* vs. *Stannard*, 17 Mass. 282, 286.

Fifth. When the tenant at will commits waste, as by removing manure. *Daniels* vs. *Pond*, 21 Pick. 367.

Sixth. When the tenant at will assigns his estate. *Cooper* vs. *Adams*, 6 Cush. 87.

4. Nor to terminate a tenancy at sufferance in any case. *Kinsley* vs. *Ames*, 2 Met. 29. *Howard* vs. *Merriam*, 5 Cush. 571.

III. *Form of.*

1. For non-payment of rent.

a. The statutes require "fourteen days notice to quit, given in writing, by the landlord to his tenant." R. S. c. 60, s. 26. St. 1847, c. 267, s. 1.

b. A notice to quit "*forthwith*" is bad, and gives no right at the end of fourteen days. *Oakes* vs. *Munroe*, 8 Cush. 282.

c. "The notice must fix a day or time to quit at or after the expiration of the required time of notice, by definitively naming the day, or denoting such time with reasonable exactness and certainty." Shaw, C. J. *Currier* vs. *Barker*, 2 Gray 224, 228.

d. The notice need not state the cause of giving it. *Granger* vs. *Brown*, 11 Cush. 191.

e. The following would seem to be a proper form of notice :—

BOSTON, 1 Jan., 1858.

To RICHARD ROE :

SIR :—You are hereby notified to quit and deliver up the premises now occupied by you at ———, in fourteen days from the date of your receipt hereof, your rent being in arrear. JOHN DOE.

Last clause may be omitted, as the tenant is supposed to be aware of the fact. *Granger* vs. *Brown*, 11 Cush. 191.

2. To terminate a tenancy at will.

a. The statute provision is that " all estates at will may be determined by either party by three months notice in writing, for that purpose, given to the other party ; and when the rent is payable at periods of less than three months, the time of such notice shall be sufficient if it be equal to the interval between the days of payment." R. S. c. 60, s. 26.

b. Previous to statute provision on the subject, it was held that a tenant at will was entitled to "reasonable notice to quit." *Howard* vs. *Merriam*, 5 Cush. 572. *Rising* vs. *Stannard*, 17 Mass. 282. *Ellis* vs. *Paige*, 1 Pick. 43. *Coffin* vs. *Lunt*, 2 Pick. 70. *Cutler* vs. *Winsor*, 6 Pick. 339.

c. "When by contract or by law the holding is for certain intervals of time, as from week to week, from month to month, or from year to year, the notice must be to quit at the expiration of one of those terms." Shaw, C. J., in *Currier* vs. *Barker*, 2 Gray 224, 226. *Prescott* vs. *Elm*, 7 Cush. 346.

d. The notice must fix the time with reasonable exactness, and certain as in the case of notice for non-payment of rent. *Steward* vs. *Harding*, 2 Gray 335. *Currier* vs. *Barker*, 2 Gray 224, 226. *Oakes* vs. *Munroe*, 8 Cush. 287.

e. The notice must either specify the exact day on which the next term expires, or must state generally that the tenancy will be terminated in one month (or whatsoever the term may be) from the next rent day. *Sanford* vs. *Harvey*, 11 Cush. 93.

f. The following form, *mutatis mutandis*, would seem to be proper for notices to terminate tenancies at will :

BOSTON, 1 Jan., 1857.

To RICHARD ROE,

Sir :—You are hereby notified to quit and deliver up the premises now occupied by you at ———, in one month from this date, (or "from the day when your rent shall next become due and payable." See *Sanford* vs. *Harvey*, 11 Cush. 93,) it being my intention to terminate your tenancy at that time. JOHN DOE.

The last clause may be omitted. *Granger* vs. *Brown*, 11 Cush. 191.

3. To terminate a tenancy in accordance with an agreement between the parties.

a. The notice must conform to the terms of the agreement. *Oakes* vs. *Munroe*, 8 Cush. 288. *Baker* vs. *Adams*, 5 Cush. 99.

b. If the agreement provide that the tenancy may be terminated by a shorter notice than the law would otherwise require, that notice, in order to be valid, must expire with the interval between the days on which rent is payable. *Prescott* vs. *Elm*, 7 Cush. 348. *Baker* vs. *Adams*, 5 Cush. 99.

4. The authority of an attorney who signs the name of his principal to a notice need not appear, as it is a matter to be proved at the trial. *Mizner* vs. *Munroe* Ante. p. 35.

IV. *Effect of.*

1. After the expiration of the notice, process under R. S. c. 104 may be maintained by the landlord against the tenant. R. S. c. 104, s. 2, &c.

a. But "*perhaps* if the full amount of rent is tendered at any time before proceedings are commenced under the landlord and tenant act, it is a good bar to such complaint." Shaw, C. J., in *Tuttle* vs. *Bean*, 13 Met. 275, 278.

In case of a written lease, the tender of the rent due, with interest and costs, four days before return day of writ, is a bar to the process to enforce forfeiture. St. 1857, c. 55.

V. *Waiver of.*

1. The acceptance of rent, as rent, for a time subsequent to the expiration of the notice to quit, is a waiver of the notice. *Collins* vs. *Canty*, 6 Cush. 415.

2. It was also held that the notice was waived when the landlord had declined a tender of the rent, and had told the tenant that he need not quit. *Tuttle* vs *Bean*, 13 Met. 275, 277.

3. But it was held that there was no waiver when the landlord, at the expiration of a notice to quit gave the tenant permission to "remain a short time longer, till he could sell off his goods." *Babcock* vs. *Allen*, 13 Met. 273.

INTELLIGENCE AND MISCELLANY.

EDITORIAL NOTICE.—Our readers will observe that with this number, which begins the twenty-first volume of the Law Reporter, we have adopted a slight modification of form, giving to our readers sixty-four pages of text instead of sixty, as before. This change will enable us in future numbers to preserve greater uniformity of type than of late, the great pressure of our reading matter having obliged us to put many of our abstracts, etc., in smaller print than that originally adopted as our standard.

We may also be permitted to offer our thanks to the many constant friends who have been faithful to the Law Reporter for twenty years, as well as to those who have more recently joined the list of subscribers and contributors. Since the present senior editor took the conduct of the journal, he has followed the plan of giving a great number of abstracts of leading and important cases far in advance of the reports. The value of this has been shown, not only by the increase of the subscription list, which has been quite regular and considerable, but also by the extent to which these abstracts have been borrowed by contemporary publications, sometimes with and sometimes without acknowledgment. We must add that the Quarterly Law Journal, now or lately published at Richmond, Virginia, has uniformly given credit for whatever it has borrowed of us.

Arrangements have now been made for printing this journal in Boston, instead of Cambridge, by which much delay, which has hitherto been unavoidable, will be obviated, and the numbers will appear at or near the beginning of each month. We may add that great labor and expense are now bestowed on the work, and a still further increase of the subscription list will not be unacceptable.

A NEW AND COMPLETE DIGEST OF THE MASSACHUSETTS REPORTS. — That this has long been needed in the profession will, we think, be universally allowed. There are now twelve volumes of reports not included in Minot's Supplement, through which it is necessary to travel in order to collect all the decisions and arrive with any degree of certainty at the existing law. Our readers will be glad to hear that the work of preparing a new digest of the whole seventy-one volumes, from the first of Massachusetts to the fifth of Gray and the twelfth of Cushing, inclusive, has been undertaken by Messrs. E. H. Bennett and F. F. Heard, already well known by their works on criminal law. The Digest will be put to press in October next.

JUDICIAL QUALIFICATIONS. — Our friend Jones, who is something of a jockey, says that judges, like horses, should be kind as well as sound.

A BIRD IN THE HAND. — It was the late Colonel W., who gave his office boy the choice between a quarter of a dollar a week, and half the profits of his law business. The boy, preferring a certainty, decided for the quarter. It is on this principle that some judicial salaries appear to be computed.

OBITUARY NOTICE.

Since our last, the bar of Suffolk County has lost, by the death of Mr. GEORGE MINOT, one of its most promising and worthy members. This event should not be permitted to pass without notice. The following sketch is furnished as a brief and imperfect memorial of the deceased:

GEORGE MINOT died at his home in Reading, on the 16th of April, 1858. He was the son of Hon. Stephen Minot, of Haverhill, at which place he was born, January 5th, 1817.

His early life was marked by simplicity and truthfulness. He then learned, from the teachings of a devoted mother, the great principles of the Christian life. His habits of thought were formed under the directing influence of his father, a good lawyer and keen observer, who took unwearied pains in the cultivation and development of his mental powers, and in guiding him to place his confidence in the real, and not the seeming.

After the preparatory course of study at Phillips Exeter Academy then under the charge of the celebrated Dr. Abbott, he entered Harvard College in 1832, and graduated with the class of 1836, and immediately commenced the study of law in the law school at Cambridge, and afterwards continued his studies in the office of Hon. Rufus Choate, in Boston; where, after his admission to the bar in 1839, he commenced the practice of the law, and where he continued to practice until his last sickness and death.

Mr. Minot was married in 1844 to Mrs. Emily P. Ogle, who died in 1853, leaving one son; and in December, 1854, to Miss Elizabeth Dawes, who, with their daughter, survives him.

To the profession of his choice, Mr. Minot devoted himself with faithful and successful assiduity; but he is more widely known by his editorial labors. He was the careful and accurate editor of the United States Statutes at Large, during the last ten years. He also rendered valuable assistance to the late Mr. Peters in the preparation of the first eight volumes of the Statutes published in 1848, the full and complete general index of which was the exclusive result of his labors. His name is also familiar to the profession, as associate reporter of the decisions of the late Judge Woodbury, in the first Circuit Court; and his edition of the nine volumes of English Admiralty Reports, republished by Little & Brown, in 1853, bears evidence of his industry and learning in this branch of his profession. In 1844, he edited the work which has made his name familiar to every Massachusetts lawyer,—the Digest of the Decisions of the Supreme Court of this State, to which he added a supplement in 1852; and until compelled by the state of his health to lay aside his labors, he was intending to recast the entire work, and, including the later reports, to make it more completely useful to the profession, more just to his own reputation, and that of the court whose learning and ability it would illustrate.

His health had become feeble during the last few years, and since the commencement of the present year, had compelled him to abstain entirely from the active duties of his profession.

Mr. Minot was, for many years, solicitor of one of our largest and most

important railroad institutions,—The Boston and Maine Railroad Corpoporation. As such, he was called on to advise in many very delicate and very difficult controversies and deliberations; and in all he was remarkable, at once, for guilelessness, firmness, and discretion. Those who best know what he did, and how generally successful, or how happy were the results,—can best appreciate this union of scarcely reconcilable qualities.

In his profession of the law, he was neither litigious nor exorbitant in his fees; nor did he contract a stain of dishonor or suspicion. He was prudent, just, and cautious. He knew at once the necessary law of his case, and all the sources of legal knowledge; and he was a fair, keen, and skillful legal reasoner, and inquirer after truth.

His knowledge of the jurisprudence of chancery, and his fondness for it were very remarkable. Few men of any time of life had studied it so thoroughly, discerned so well how it rose above, and how it supplied the deficiencies of the common law, or loved it as truly and as intelligently. To such a mind and such tastes as his, its comparative freedom from technicalities, its regulated discretion, and its efforts to accomplish exact justice and effectual relief, possessed a charm and had a value, far beyond that of the more artificial science, whose incompleteness and rigidity it supplies and ameliorates, and whose certainty at last reposes on the learning, or the ignorance, or the humors of man.

Beyond his profession, he read and he speculated, more variously and more independently than most men of any profession. Elegant general literature,—music, of which, in its science and practice, he was a lover and master,—politics,—theology, in its relations to the religion revealed in the Bible, and to that philosophy which performs its main achievement in conciliating faith with reason,—these were his recreations. To sacred music and poetry he devoted himself with fervor. He loved especially the standard hymns and tunes of the church, in which the congregation united in public worship. While in college he was organist of the chapel choir — and during most of his maturer years, he conducted the sacred music of the religious society with which he worshipped. In his religious belief, while he did not receive as a whole the creed of any sect, he was sincere, earnest and catholic. He made the Bible his constant study; he read and explained it in his house; and his heart embraced, as his reason had acknowledged its truths.

This sketch would be more imperfect than it is, if it did not honorably and affectionately mention Mr. Minot's personal and moral character. He was modest, pure, and incorrupt. He had no vices. He slandered and he flattered no man. He felt and inspired a warm love and a deep respect. A long, disheartening disease, and a probable premature termination of a happy future on earth, while they made him thoughtful and silent, did not make him unjust, or morose, or gloomy.

"Many have died more famous—some far more knowing—none so innocent."

NOTICES OF NEW PUBLICATIONS.

An ABRIDGMENT OF THE LAW OF NISI PRIUS. BY WILLIAM SELWYN. With notes and references to the decisions of the courts of this country, by the former editors, Henry Wheaton, Thomas J. Wharton, and Edward E. Law. Seventh American Edition, with additional notes, and references to American cases, by Asa I. Fish. From the Eleventh London Edition. Philadelphia: Robert H. Small. 1857. 2 vols. Pp. 1523.

This most excellent and accurate hand-book for the practicing lawyer, has stood its ground now for fifty years, without losing a particle either of its usefulness or its reputation. The English editions have all been brought out under the supervision of its learned and accomplished author, while in this country it has been adopted and enriched by the labors of several most able and careful annotators.

It is only necessary to say, that the present edition keeps the book up to its high standard of excellence, without overloading it with comment.

INSOLVENTS IN MASSACHUSETTS.

Name of Insolvent.	Residence.	Commenceme't of Proceedings.	Name of Judge.
		1858.	
Abbott, James A.	Boston,	March 19,	Isaac Ames.
Ames, Edward B.	Salem,	" 12,	Henry B. Fernald.
Barnard, George L.	Boston,	" 6,	Isaac Ames.
Bell, Edward D. (1)	Malden,	" 1,	Isaac Ames.
Bellows, Smith S.	Bernardston,	Feb. 23,	Horace I. Hodges.
Bemis, Augustus L. (2)	Boston,	March 31,	Isaac Ames.
Blanchard, Daniel,	Abington,	" 15,	David Perkins.
Boise, Lewis D. (2)	Newton,	" 31,	Isaac Ames.
Bolles, Frederick (3)	Wareham,	" 25,	David Perkins.
Boynton, Joseph	Brighton,	" 11,	Isaac Ames.
Bragdon, James	Boston,	" 8,	Isaac Ames.
Brigham, George F. (4)	W. Boylston,	" 17,	Wm W. Rice.
Brindall, Charles (5)	Gloucester,	" 13,	Henry B. Fernald.
Brown, Albert F.	Boston,	" 8,	Isaac Ames.
Brown, Ezra P.	Worcester,	" 12,	Wm. W. Rice.
Brown, George (6)	Roxbury,	" 26,	Francis Hilliard.
Browning, Charles A. (7)	Boston,	" 24,	Isaac Ames
Burnham, George W.	Essex,	" 25,	Henry B. Fernald.
Campbell, George, } (8) Campbell, Thomas, }	Walpole,	" 17,	Francis Hilliard.
Carter, James W. } (9) Carter, John }	Boston,	" 8,	Isaac Ames.
Cary, Wm. A. (10)	Worcester,	" 2,	Wm. W. Rice.
Chadwick, Benj. P.	Bradford,	" 13,	Henry B. Fernald.
Chandler, Edward A.	Lynn,	" 2,	Henry B. Fernald.

Name of Insolvent.	Residence.	Commenceme't of Proceedings.	Name of Judge.
Chaplain, Alexander,	North Bridgewater,	Feb. 26,	David Perkins.
Chase, Danforth	Swanzy,	March 9,	Joshua C. Stone.
Conant, Ira M.	Attleborough,	" 20,	Joshua C. Stone.
Crocker, Amos H.	Dedham,	" 1,	Francis Hilliard.
Davis, Benj. P.	North Bridgewater,	" 24,	David Perkins.
Davis, Richard (11)	Rockport,	" 26,	Henry B. Fernald.
Deane, Nath'l	Boston,	" 18,	Isaac Ames.
Denison, D. A. & H. S.(12)	Coleraine,	" 17,	H. I. Hodges.
Farley, Henry W.	Charlestown,	" 16,	L. J. Fletcher.
Flagg, Geo. A.	Athol,	" 20,	Wm. W. Rice.
Gallond, George B.	Amherst,	" 27,	H. I. Hodges.
Gilbert, Benj. (13)	Boston,	" 11,	Isaac Ames.
Gray, John E. (14)	Sterling,	" 23,	Wm. W. Rice.
Harrington, Adam L. (7)	Boston,	" 24,	Isaac Ames.
Hartwell, Alfred	Worcester,	April 1,	Wm. W. Rice.
Hall, John B.	Watertown,	March 30,	L. J. Fletcher.
Haskell, Josiah C. (11)	Rockport,	" 26,	Henry B Fernald.
Haskins, Russell	Freetown,	" 31,	Joshua C. Stone.
Hayward, John	Boston,	" 20,	Isaac Ames.
Hayward, Linus E.	W. Bridgewater,	" 24,	David Perkins.
Howard, George	W. Bridgewater,	" 31,	David Perkins.
Howard, J. Charles	Salem,	" 27,	Henry B. Fernald.
Hunt, Jerod	Boston,	" 20,	Isaac Ames.
Ingell, J. Wilson	Randolph,	" 11,	Francis Hilliard.
Ireson, Samuel S.	Lynn,	" 13,	Henry B. Fernald.
Kingman, Edward	Mansfield,	" 24,	Joshua C. Stone.
Lathrop, B. E. (1)	Dorchester,	" 1,	Isaac Ames.
Lee, Nelson M. (14)	Sterling,	" 23,	Wm. W. Rice.
Leonard, Cyrus,	Foxborough.	" 2,	Francis Hilliard.
Lincoln, James F. (3)	Wareham,	" 25,	David Perkins.
Luther, Benj. S.	Worcester,	" 19,	Wm. W. Rice.
Maynard, John E.	Boston,	" 29,	Isaac Ames.
Merritt, Washington H.	Swampscott,	" 2,	Henry B. Fernald.
Montgomery, Wm.	Roxbury,	" 11,	Francis Hilliard.
Morgan, James H	Boston,	" 2,	Isaac Ames.
Munro, John (6)	Roxbury,	" 26,	Francis Hilliard.
Muzzy, Nathan M. (10)	Worcester,	" 2,	Wm. W. Rice.
Nye, Thomas S.	Wareham,	" 24,	David Perkins.
Paine, Elias B.	Newton,	" 16,	Isaac Ames.
Perrin, Franklin (13)	Cambridge,	" 11,	Isaac Ames.
Perkins, Ezra, 3d	Essex,	" 10,	Henry B. Fernald.
Phillips, Ezekiel B.	Natick,	" 25,	L. J. Fletcher.
Phipps, Joseph / Pickering, James (15)	Salem,	" 30,	Henry B. Fernald.
Pond, Goldsbury,	Franklin,	Feb. 25,	Francis Hilliard.
Ramsdell, Samuel D.	Hanson,	" 2,	David Perkins.
Raymore, James F. (4)	Worcester,	March 17,	Wm. W. Rice.
Richardson, Samuel S.	Winchester,	" 16,	L. J. Fletcher.
Ripley Ammi R. L.	Abington,	" 6,	David Perkins.
Severy, Moody H.	Millbury,	" 23,	Wm. W. Rice.
Shelden, Augustus V.	W. Boylston.	" 16,	Wm. W. Rice.
Shienfield, Abram	Boston,	" 20,	Isaac Ames.
Smith, David	Somerville,	" 8,	L. J. Fletcher.
Spurr, George W.	Winchester,	" 8,	Isaac Ames.
Swift, Charles (5)	Gloucester,	" 13,	Henry B. Fernald.
Thing, Charles H. (1)	Boston,	" 1,	Isaac Ames.
Thompsom, Joseph P.	Lowell,	" 26,	L. J. Fletcher.
Tolman, James P.	Waltham,	" 18,	L. J. Fletcher.
Williamson, Milton W. (4)	Worcester,	" 17,	Wm. W. Rice.

(1) Bell, Thing & Co.
(2) Bemis & Boise.
(3) Lincoln & Bolles.
(4) J. F. Raymore & Co.
(5) Swift & Brindall.
(6) Brown & Munro.
(7) C. A. Browning & Co.
(8) T. & G. Campbell.
(9) J. W. Carter & Brother.
(10) Muzzy & Co.
(11) Haskill & Davis.
(12) D. A. & H. S. Denison.
(13) Perrin & Gilbert.
(14) N. M. Lee & Co.
(15) Phipps & Pickering.